

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division

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BASF PLANT SCIENCE, LP,

Plaintiff,

v.

COMMONWEALTH SCIENTIFIC AND  
INDUSTRIAL RESEARCH  
ORGANISATION,

Defendant.

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COMMONWEALTH SCIENTIFIC AND  
INDUSTRIAL RESEARCH  
ORGANISATION, GRAINS RESEARCH  
AND DEVELOPMENT CORP., AND  
NUSEED PTY LTD.,

Plaintiff-Counterclaimants,

v.

BASF PLANT SCIENCE, LP, and  
CARGILL, INC.,

Defendants-Counterdefendants.  
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CIVIL ACTION NO.  
2:17cv503

TRANSCRIPT OF PROCEEDINGS  
(Jury Trial - Day 13)

Norfolk, Virginia

November 4, 2019

BEFORE: THE HONORABLE HENRY COKE MORGAN, JR.  
United States District Judge, and a jury

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1 (Proceedings commenced at 9:57 a.m.)

2 THE COURT: All right. Counsel, I went through your  
3 briefs. I don't see any way to avoid an issue that one of  
4 you brought up, I'm not sure who, about avoiding having the  
5 damage witnesses testify twice. I think they're going to  
6 have to do that. And this phase of the case is going to deal  
7 only with past damages. You should caution your witnesses  
8 not to mention anything about injunctions or any form of  
9 future damages.

10 So that's all we're talking about in opening  
11 statements. That's all the evidence we'll deal with, is past  
12 damages. And then when the jury decides that issue, we'll --  
13 well, actually, probably while they're deliberating, we'll  
14 start talking about future damages, but we will not talk  
15 about them in this phase of the case.

16 Somebody raised something about the '792 patent not  
17 being used. I don't think that's going to have any major  
18 effect on this phase of the case. We'll take it up prior to  
19 the next phase, if you claim that that wasn't used. If you  
20 claim that wasn't used, so be it.

21 All right. We're not going to keep the jury  
22 waiting.

23 (The jury entered the courtroom.)

24 THE COURT: Good morning, ladies and gentlemen.  
25 This morning we're going to take up what is called past

1 damages, that is, damages incurred by the plaintiff up until  
2 this point. That's the issue the jury has to decide. That's  
3 all we're going to be talking about at this point in the  
4 case.

5           You will hear opening statements from counsel just  
6 as we did in the previous phases of the case. But, of  
7 course, as I say, at this point we're limited to the issue of  
8 what are the past damages suffered by the proponent of the  
9 patent.

10           All right. You may proceed.

11           MR. SUNG: Thank you, Your Honor.

12           Good morning, everyone. My name is Lawrence Sung,  
13 and I'm counsel for Nuseed. I met you on the first day.  
14 Remember three weeks ago when you crammed into the front rows  
15 right behind me here, you were probably looking around and  
16 seeing all the lawyers and maybe even asking yourself, so  
17 this is what it's like when the circus comes to town. That's  
18 okay. We all get it. We've journeyed quite a distance  
19 together since then, and now we're asking you to come just a  
20 bit farther.

21           For our part, we promise to take you through our  
22 proofs as efficiently as we can. You will hear from just two  
23 witnesses for the proponents: Ms. Benita Boettner, Nuseed's  
24 new omega-3 global general manager, and our damages expert,  
25 Mr. John Jarosz.

1           You might recall Ms. Boettner. The opponents played  
2 a video clip of her deposition earlier. They all look like  
3 moving mugshots. Yes. But you'll get to hear from her and  
4 see her live today, and, hopefully, that will give you a  
5 better sense of the person she is.

6           Like a stage play, a patent trial can have different  
7 phases or acts. We finished Act I, the liability phase, when  
8 you found that BASF and Cargill infringed five of the  
9 asserted patents. We now start with Act II, the damages  
10 phase, which asks what the appropriate remedy is for BASF and  
11 Cargill's infringements.

12           We're separately going to be talking to Judge Morgan  
13 about another aspect of remedies, but today, we're here just  
14 to talk with you specifically about your starring role, which  
15 is going to be assigning a royalty in the form of a  
16 percentage.

17           And this rate is the centerpiece for two different  
18 reasons: First, from it, we can calculate the amount of past  
19 damages, that is, the loss that the proponents have already  
20 suffered due to BASF and Cargill's infringement; and, more  
21 importantly, your rate can also serve as a guide for  
22 conversations that we'll have with Judge Morgan, again about  
23 other remedies that might be available to the proponents.

24           We'll continue to be straight with you. Helpful or  
25 hurtful to this case, you'll hear about the facts as we know

1       them.   So let's begin with a few points.

2               Patent damages are not about punishment.  It's not a  
3       toll or a tax or a fee that a patent owner collects.  
4       Remember, the patent video described a patent as an earned  
5       right to temporary exclusivity, but if there is the presence  
6       of various products on the market, then that exclusivity may  
7       not be there, and so what we do with damages sometimes is to  
8       assign fairly a compensation for any exclusivity that might  
9       have been taken away.

10              The opponents have said repeatedly that no one has  
11       sold a product yet.  We agree.  The opponents will keep  
12       reminding you that the total amount of money they owe for  
13       past damages is less than a couple thousand dollars.  We  
14       agree with that, too, but that doesn't mean that's what  
15       happened up till now is unimportant.

16              It's actually the opposite.  That's right.  The work  
17       that BASF and Cargill have been doing to obtain regulatory  
18       approval, and to get their product ready for market, is a  
19       great harm to the proponents even if BASF and Cargill haven't  
20       made a cent yet.

21              What they've done isn't research.  It's  
22       commercialization; it's competition; and most of all, it's  
23       infringement.  And what's plain as day, a company does not  
24       take 20-plus years, employ hundreds of people, and spend  
25       hundreds of millions of dollars on something that has zero

1 commercial value.

2 Now, in some cases, we can use the lost profits of a  
3 patent owner, due to the infringer's sale, as a proxy for the  
4 value of the economic injury. But sometimes, it's harder to  
5 quantify when products haven't been sold yet, such as in this  
6 case, and that's why we'll be talking again with Judge Morgan  
7 about another remedy. But it's wrong to say that the value  
8 on infringing conduct cannot be set alternatively. Indeed,  
9 the law addresses the circumstance by asking juries to  
10 calculate something called a reasonable royalty.

11 Now, you might have wondered, and, yes, the patents  
12 have -- the parties have, for years, on their own tried and  
13 failed to work out a business settlement, mainly because of a  
14 disagreement about the patents that you've heard about but  
15 also because we've been unable to come up with a mutually  
16 acceptable dollar amount.

17 So now we're asking you to sit in judgment to tell  
18 us what royalty the parties should have agreed to if they're  
19 all put together in a room and told to come up with a  
20 percentage that would allow both sides to be on the market.

21 The patent law calls this a hypothetical  
22 negotiation. And like all good compromises, no one gets  
23 their way entirely. But this is one path to calculating a  
24 fair compensation for the patent rights that were violated.  
25 Again, the percentage you set now is important for those two



1 reasons that I mentioned earlier; to determine past damages  
2 and for informing Judge Morgan on another matter.

3 Now, opponents' counsel may try to tell you in this  
4 phase of the trial that Chilean's fish feed makers viewed the  
5 two products, Nuseed's Aquaterra and Cargill's Latitude,  
6 differently. But Cargill's witnesses have already spoken of  
7 Nuseed and Cargill as direct competitors; and Aquaterra and  
8 Latitude as competing products.

9 And as you heard from both sides in Act I, the  
10 aquaculture market alone for omega-3 oil is a billion-dollar  
11 business. Again, you'll hear Cargill say why are we even  
12 talking about past damages when no one's sold anything yet?  
13 But you heard Mr. Horton admit that Cargill has been growing  
14 infringing crops since 2017, regardless of whether they call  
15 it research or trials or testing.

16 You don't get a pass on paying for your infringement  
17 just because you haven't made any money on it yet. And  
18 Cargill wouldn't be ready to sell Latitude but for that past  
19 infringing conduct. Cargill declared here that commercial  
20 launch has begun, and that was years ago, long before  
21 receiving USDA deregulation and before the so-called brand  
22 launch of Latitude that Mr. Christiansen spoke of. Don't be  
23 fooled. The absence of a commercial sale of Latitude is not  
24 the same thing as the absence of commercial activity by  
25 Cargill. Cargill has been busy promoting Latitude to the

1 aquaculture market, and by this activity, Cargill has harmed  
2 and continues to harm Nuseed.

3 Cargill was keeping a watchful eye on the  
4 competition even in 2016. Fast-forward to present day, and  
5 pardon the pun, Nuseed is the only one left standing in the  
6 field of crop-based omega-3 oils. And Cargill was taking aim  
7 when it noted that CSIRO and Nuseed need partners and money  
8 to execute.

9 Cargill has always known it can leverage its  
10 long-time supply chain partners and outspend Nuseed handily.  
11 As we've said before, the patents in this case are what  
12 protect us and what help level the playing field.

13 And what's been Cargill's master plan? Global  
14 commercial dominance into 2025. You see here planting of a  
15 half a million acres of Latitude-producing crops has been its  
16 vision all along.

17 As for Nuseed, we haven't been sitting idly either.  
18 The oil crushed from seeds harvested from 35,000 acres  
19 planted this year will be sold as Aquaterra next year, 150  
20 railcars full of that precious oil.

21 Nuseed has been giving Aquaterra away for free --  
22 that's right; free -- to feed over a million salmon in Chile  
23 to confirm product safety and to learn the benefits of a  
24 DHA-rich fish-oil replacement. If Cargill is allowed to sell  
25 Latitude, it would reach the windfall of Nuseed's hard and

1 expensive work to educate and build omega-3 canola oil  
2 interest with those same aquaculture customers.

3 Nuseed is also expected to obtain FDA regulatory  
4 approval soon for the sale of Nutriterra to the human market.

5 These studies are reported every day making certain  
6 health benefits with DHA-rich omega-3 oil for human  
7 nutritional supplements and pharmaceuticals.

8 And with USDA regulation or deregulation now in  
9 hand, nothing stops Cargill from writing sales contracts  
10 today in Chile. This would be for Latitude that Cargill will  
11 plant crops for next spring in unrestricted acreage. And the  
12 folks in Chile have already heard their share of rumor and  
13 innuendo about Aquaterra and Latitude, so it shouldn't  
14 surprise you that the market is confused about a lot of  
15 things. And because Cargill keeps reminding the aquaculture  
16 industry that Latitude is coming, Nuseed is harmed because  
17 those Chilean fish feed makers may think twice about entering  
18 into supply contracts with Nuseed.

19 Aquaterra and Latitude are the only two crop-based  
20 omega-3 oils in the foreseeable future. There aren't any  
21 other scaleable, sustainable, and cost-efficient alternatives  
22 to natural fish oil available. This is effectively a  
23 two-player market where every infringing sale of Latitude is  
24 a lost sale of Aquaterra. If Latitude is allowed to enter  
25 the market, it will compete with Aquaterra even though it

1 infringes.

2           Now, you've heard earlier that Cargill bought into  
3 the aquaculture market in 2015 by purchasing a company called  
4 EWOS for \$1.5 billion. EWOS is now a division of Cargill  
5 known as Cargill Aqua Nutrition. And they control almost a  
6 third of the global fish feed market. So if Cargill is  
7 allowed to sell Latitude, Nuseed will be shut out completely  
8 of a third of the market, automatically, and limited to  
9 competing for the only remaining two-thirds of the market.

10           So that's Cargill's edge. So, you see, some may  
11 call a patent a temporary monopoly granted by the government,  
12 but if the asserted patents are not enforced here, Cargill's  
13 market power will give it a monopoly on omega-3 canola oil.  
14 And plus, as both buyer and seller of Latitude, Cargill can  
15 engage in lower transfer pricing. And what happens with  
16 Aquaterra, as we mentioned, will have a direct impact on  
17 Nuseed's financial ability to bring Nutriterra to the human  
18 market for the health benefit of consumers, which brings us  
19 all back to the critical question for you today.

20           What royalty should the parties have agreed to in  
21 November 2018 to permit the infringers to sell Latitude? And  
22 two considerations go into this hypothetical negotiation, and  
23 they're called comparability and apportionment. So let's  
24 talk about comparability first. If you're selling your home,  
25 you price it based on comparables. This might include what

1 you bought your home for, what similar homes have sold for,  
2 but you wouldn't price that based on what somebody else paid  
3 just for the bricks or the concrete that they used to build  
4 their home.

5 So what's the right benchmark for valuing the  
6 patents here? After looking at many comparables, our expert,  
7 Mr. Jarosz, selected the CSIRO, GRDC, and Nuseed agreement on  
8 the one hand; and, secondly, the BASF and Cargill agreement,  
9 and picked those as the two most reliable comparables. These  
10 agreements are by the parties to this case concerning the  
11 omega-3 canola technology in the case.

12 What better benchmarks than the same who, what,  
13 when, where, how and why? Plus Mr. Jarosz didn't just lift  
14 numbers straight out of these contracts. He properly  
15 adjusted for certain factors and calculated royalties. So  
16 the royalty percentages he arrived at was 12.4 percent and 13  
17 percent, respectively. But unlike rates from agreements  
18 between friends, you'd expect the rate that would apply to a  
19 competitor would be much higher.

20 On the other hand, the opponents' experts will point  
21 to what BASF paid others for the right to use certain  
22 enzymes, only some of which are used to produce Latitude, and  
23 they'll say that that's the measure of what BASF and Cargill  
24 owe for infringing the asserted patents, between .7 percent  
25 and 2.3 percent, or expressed another way, 1.4 percent plus a

1 one-time payment of \$1.235 million. Mind you, this is almost  
2 10 times less than what Cargill paid BASF in their own  
3 agreement, and it's certainly nothing near the \$200 million  
4 they've spent developing Latitude.

5 We ask that you accept Mr. Jarosz's comparables and  
6 to reject those of the opponents' expert.

7 So what about apportionment? You've already heard  
8 testimony from Dr. Kunst that each of the asserted patents  
9 covers the entire blueprint or pathway of the invention.  
10 Mr. Jarosz supplied apportionment correctly in his analysis.

11 The infringement of any one of those asserted  
12 patents commands the full value of this technology. It's not  
13 just to a component or a minor feature of omega-3 canola.

14 Now, Cargill might tout other aspects of its  
15 Latitude-producing seeds to try and diminish the patented  
16 technology that is only a minor feature, but the bottom line  
17 is, without the infringing LFK genes, Cargill's canola can't  
18 make long-chain omega-3s, and if Latitude didn't contain  
19 long-chain omega-3s, we wouldn't even be here.

20 So what's the final scorecard? A reasonable royalty  
21 of 12.4 percent is what BASF and Cargill would have paid if  
22 they got the same deal as Nuseed under the CSIRO, GRDC, and  
23 Nuseed agreements.

24 That's the very least that BASF and Cargill should  
25 pay. But, again, because competitors shouldn't expect to get

1 the same rate as true partners do, the rate we'd be asking  
2 for would be higher.

3 Now, a royalty of 49.1 percent would be what the  
4 proponents would be losing due to BASF and Cargill's  
5 infringement. And if Cargill were to come onto the market  
6 with Latitude, this is the amount it would take to make the  
7 proponents whole and keep Nuseed in business.

8 Now, would BASF and Cargill have done much better  
9 had they struck a deal with us? Perhaps. But as opponents  
10 noted in their closing, they, instead, chose to sue us twice,  
11 bringing us here. You've already sent a powerful message  
12 that BASF and Cargill cannot ignore the proponents' patents.

13 We ask that you now hold them accountable for that  
14 infringement. Please reject the single-digit royalty number  
15 suggested by BASF and Cargill. To say that this fight has  
16 been over 1.4 percent or just a few thousand bucks, well, you  
17 know what rings hollow and what rings true. Thank you for  
18 your kind attention.

19 MS. SHAW: Good morning, ladies and gentlemen. My  
20 name is Anna Shaw, and I represent BASF. I want to first  
21 thank all of you for your service over the past few weeks,  
22 and also coming back today for another round. You have  
23 listened carefully and often patiently to our witnesses and  
24 closely reviewed the evidence in this case. There is no  
25 doubt that both opponents and proponents of the patents, as

1 well as this Court, appreciate your service and have been  
2 impressed with the rigor of your deliberations on what have  
3 turned out to be very highly complex and scientific matters.

4           It has been a long road, and we are very close to  
5 the end, but there remains one undecided and very important  
6 decision, and that is what is the remedy appropriate here?

7           Now, just to be clear, the decision before you is  
8 what is the total amount of passed damages in this case? And  
9 the amount that the proponents of the patent are requesting  
10 is \$356 to \$1,456, and you heard that amount correctly.

11 About three weeks ago, proponents asked you, the jury, to  
12 find five groups of patents, the Groups A, B, C, D, and E  
13 patents valid, infringed, and co-owned by BASF and Cargill.

14           During the trial and before the verdict was entered,  
15 this Court found that the Group C patent was not infringed.  
16 Then, just last week, proponents dropped their infringement  
17 claim for the Group D patent against Cargill's commercial  
18 plant line, the 9093 line. The reason why is because  
19 proponents' attempt to target Cargill's commercial product  
20 missed the mark. Remember, that the Group D patent only  
21 covers a specific oil profile. It does not cover plants,  
22 cells, or seeds.

23           It does not cover any genes, including the Acyl-CoA  
24 genes or bifunctional genes, and it does not cover the  
25 delta-6 pathway, and I hope that's the last time I refer to



1 the Acyl-CoA bifunctional enzymes or delta-6 pathway again,  
2 as I'm sure all of you do as well.

3 When they filed that Group D patent in August of  
4 2017, proponents targeted the very specific oil profile from  
5 the LFK elite event in BASF's research canola line, which was  
6 publicly disclosed in its petition for deregulation.

7 This was not oil from Cargill's commercial lines.  
8 Remember, Cargill took the LFK elite event and transferred it  
9 into their commercial hybrid lines. Then they did further  
10 cross-breeding to improve the profile of that oil.

11 As a result, the oil profile of Cargill's Latitude  
12 product, which is what we are talking about here today in  
13 this courtroom, does not infringe the Group D patent.

14 So on the Group D patent, proponents are left with a  
15 finding of the infringement on oil that will never be offered  
16 for sale and for which there will be no damages.

17 Then last Friday, you found that the Group B patent  
18 was co-owned by BASF, and thus, unenforceable in this case.  
19 And you also found that the Group E patent was invalid. Of  
20 the five groups of patents that were litigated in this case,  
21 only one group, the Group A patents, which expire in April of  
22 2025, has found to be infringed by Cargill's commercial  
23 product Latitude. It is only these patents in Group A that  
24 should be the focus of your consideration as you assess  
25 damages and royalties in this case.

1           Now, the other side has painted a very optimistic  
2 picture of what the market for omega-3 oil is in the fish  
3 feed market. On the first day of trial, Mr. Zacharias  
4 testified that this is a multibillion-dollar market and that  
5 the sky is the limit. The truth is that Nuseed and Cargill  
6 have very different views of what this market looks like,  
7 what it costs to make this product and deliver it to market,  
8 and what the profit actually might be. And these differences  
9 significantly impact the royalty rate and the amount of  
10 damages in this case.

11           You will hear more about that from my colleague,  
12 Chris Dillon, and from Dmitri Gromov from Cargill who is in  
13 charge of the Latitude product. It will be up to you to  
14 decide whose numbers are more credible. The self-called  
15 start up Nuseed, or a company like Cargill who has over 100  
16 years of farming experience, including in aquaculture in the  
17 United States.

18           Now, proponents want to recover past damages for  
19 these small amounts of oil that have been produced for  
20 testing purposes in experimental use. But remember, to date,  
21 neither party has sold any omega-3 oil.

22           In fact, as you can see from this chart, Cargill  
23 does not even expect that it will have first sales until next  
24 year. So I told you that the top amount of damages that  
25 they're seeking, past damages that they're seeking, is

1 \$1,500, and you might ask yourself, why do proponents care so  
2 much about a small number? I'm going to tell you. Because  
3 there are no sales, no profits, no costs, the proponents want  
4 you, the jury, to set a reasonable royalty rate based on  
5 so-called comparable license agreements, comps that their  
6 expert, Mr. John Jarosz, will testify about. And because the  
7 total amount they're asking for is so small, they're hoping  
8 you will just go ahead, award them the whole thing, and in  
9 the process, rubber-stamp the royalty rate they are  
10 proposing.

11 But the truth is, they do not even care about this  
12 small amount. In fact, opponents offered to pay them that  
13 amount to take it off the table, but they refused.

14 Why? Because proponents hope if you agree with  
15 their small number, they can persuade this Court to use that  
16 number in future decisions that this Court might address.  
17 Now, proponents are presenting a royalty rate based on  
18 comparable agreements. Just like Mr. Sung said, it's like  
19 going on Redfin or Zillow and finding comps to determine the  
20 value of your home. But the comps that proponents rely on  
21 cover way more than just the Group A patents, which are the  
22 only patents relevant in assessing what damages are owed on  
23 the Latitude product.

24 One of the comps proponents rely on is their own  
25 agreement; the agreement between Nuseed, CSIRO, and GRDC.

1 But as you heard from Mr. Zacharias on the first day of  
2 trial, one of the specific reasons Nuseed partnered with  
3 CSIRO and GRDC was their patent estate. Those are his words,  
4 not mine.

5 That estate included way more than just the Group A  
6 patents. Further, and importantly, none of the comps  
7 Mr. Jarosz relies on provide for any payments based on  
8 production of oil without sales; and further, Mr. Jarosz  
9 relies on a rate -- Mr. Jarosz came up with a rate in May  
10 when all five groups of these patents were in play, but  
11 today, have not revised that rate at all, even though only  
12 one of those groups of patents remain.

13 Now, there are other comps in this case that BASF  
14 and Cargill's expert, Mr. Brian Napper, relied on to come up  
15 with a reasonable royalty. And, in fact, you have already  
16 heard about these agreements during the liability phase  
17 during the testimony of Dr. Carl Andre when he talked to you  
18 about how they came up with their proof of concept for their  
19 elite event.

20 And you'll see that what BASF paid those partners  
21 that they worked with while they were developing the elite  
22 event was based on fair comps, and it is a lot less than what  
23 proponents are asking for now.

24 Just this August, BASF and Cargill received  
25 regulatory approval to plant their omega-3 canola oil. This

1 means that this upcoming spring, Cargill will plant its first  
2 commercial crop of omega-3 plants in Montana. And after all  
3 that time and money that they have invested, BASF and Cargill  
4 will finally be able to offer Latitude oil to the aquaculture  
5 market next year and slowly begin to see a return on their  
6 investment.

7 But what proponents are asking you to do is to take  
8 virtually all, or even more than all, of BASF and Cargill's  
9 expected return on that investment and hand it to them.  
10 Proponents are not interested in making money by competing  
11 with BASF and Cargill in the market. If they did, they could  
12 be selling product already. They received regulatory  
13 approval a year before BASF did.

14 Proponents have chosen a different strategy, and  
15 that is to compete in this courtroom. Ladies and gentlemen,  
16 you now have the responsibility to decide whose behavior and  
17 whose work you will reward and protect. Are you going to  
18 reward proponents who have no sales, no business plan, no one  
19 responsible for sales, and are seeking to make money off of  
20 BASF and Cargill's hard work, unwilling to compete with them  
21 in the market; or will you protect BASF and Cargill, two  
22 companies that actually are committed to investing in and  
23 bringing an entirely new product to market?

24 It is hard to do what BASF and Cargill are trying to  
25 do, and many will start their journey on this path and give

1 up because it is hard, because it requires investment, and  
2 success is not overnight, must less guaranteed. BASF and  
3 Cargill have stayed the course. They filed this lawsuit to  
4 stay the course.

5 As you consider the appropriate remedy, this is the  
6 path that BASF and Cargill respectfully request that you  
7 choose to protect today. Thank you very much.

8 MR. DILLON: How much time do I have?

9 THE LAW CLERK: Three minutes, 56 seconds.

10 MR. DILLON: That will be plenty.

11 Ladies and gentlemen, I haven't met you before. My  
12 name is Chris Dillon. I work with Mr. Davis at Fish &  
13 Richardson, and we represent Cargill. And I have one  
14 question for you today. It's the same question the Judge is  
15 going to ask you at the end: What are the past damages?  
16 This is not about the future. That's for the Judge. Your  
17 sole question is what are the past damages in this case?  
18 Those accrued to date. This isn't going to be about  
19 Cargill's plans for the future or Nuseed's plans for the  
20 future. This is about what is the amount owed today, and I  
21 think you're going to base your decision on that, on the  
22 evidence, the evidence that is accrued as to the damages to  
23 date.

24 And there are a couple of factors you need to  
25 consider: One is have there been any sales of Nuseed's

1 product or of the Latitude product of my client Cargill? The  
2 answer is no. Dr. Dmitri Gromov, the program manager for  
3 Cargill's Latitude program will come and testify to you that  
4 today there is no product that exists. There are no sales,  
5 no offers for sale. The first time we're going to  
6 manufacture that product is next year. If a customer came  
7 today, there is nothing to sell. So there is no product  
8 today. All Cargill activities to date have been research and  
9 development to create that product that will be launched next  
10 year.

11 The second piece of evidence that you need to  
12 consider are those very license agreements that Mr. Sung  
13 mentioned in his opening.

14 He said his damages expert based it on the  
15 Cargill/BASF agreement and also and, primarily, on the  
16 Nuseed/GRDC agreement. What do those agreements say about  
17 this pre-sales activity? With regards to BASF and Cargill,  
18 Cargill has agreed to share the profit in the business with  
19 BASF once the business is profitable. Under -- and  
20 Dr. Dmitri Gromov will tell you that the current projections  
21 are that will occur in 2023.

22 So under the BASF/Cargill agreement, there are no  
23 past damages because nothing is owed until their business  
24 gets profitable, which necessarily occurs after there are  
25 sales. But I want you also to pay attention to the agreement

—Boettner, B. - Direct—

1 between CSIRO and GRDC and Nuseed, because under that  
2 agreement, which forms the basis for his 12.4 percent royalty  
3 rate, there is no money owed by Nuseed to CSIRO until there  
4 is a sale, which has not occurred.

5 So under both companies' sets of agreements, the  
6 parties have agreed that the commercial arrangement is once  
7 you have made a sale, then you owe a royalty; and before  
8 that, there is no money owed.

9 THE COURT: Your time is up.

10 MR. DILLON: Thank you very much.

11 THE COURT: All right. We'll hear first from the  
12 proponents.

13 MR. SUNG: Your Honor, we'd like to call Ms. Benita  
14 Boettner to the stand.

15 (Witness sworn.)

16 MR. SUNG: May I proceed?

17 THE COURT: You may.

18 BENITA BOETTNER, called by Nuseed, having been first  
19 duly sworn, was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. SUNG:

22 Q. Hello, Ms. Boettner. Please introduce yourself to the  
23 jury.

24 A. Yes. My name is Benita Boettner. I'm from Arvada,  
25 Colorado. That's a suburb of Denver.



Boettner, B. - Direct

1 Q. You were introduced to the jury via a video of your  
2 deposition last Monday. Do you recall being deposed?

3 A. I definitely do. It's not something you quickly forget.

4 Q. Do you have an understanding of why you were being  
5 deposed at that time?

6 A. It's my understanding that I was deposed because Andy  
7 Thomas had left the company and might not be available for  
8 trial.

9 Q. And who is Andy Thomas?

10 A. Andy Thomas was my boss at the time and head of  
11 innovation and strategy at Nuseed.

12 Q. And so at the time you were deposed, how long had you  
13 been in this new role of yours?

14 A. The job that I'm in now, I was two-and-a-half weeks into  
15 that job. It was brand new.

16 Q. And was that your first time being deposed?

17 A. It was.

18 Q. But you answered the questioning attorneys' questions  
19 truthfully and accurately, yes?

20 A. Yes. I tried to answer them as fully and accurately as I  
21 could.

22 Q. Before we get to your background, let's stick with a  
23 couple of the deposition aspects.

24 Do you recall testifying that Nuseed has not yet  
25 sold Aquaterra?

—Boettner, B. - Direct—

1 A. Yes. I remember that, and that's still the case.

2 Q. So what is your understanding of when Nuseed will sell  
3 Aquaterra?

4 A. So there's no definite date. There are a lot of things  
5 that go into determining when a company might sell a product,  
6 but we're working in that direction, and my personal goal is  
7 within the next six months, we'll have sold some Aquaterra.

8 Q. And so Nuseed doesn't have any contracts in place today  
9 for the sale of Aquaterra; is that correct?

10 A. That's correct. That's what I mentioned at the  
11 deposition, and that's still the case.

12 Q. And in your deposition, were you asked about any harm or  
13 injury to Nuseed from what Cargill was doing?

14 A. I remember being asked a lot about that. There were many  
15 questions, probably more than a dozen, that I remember from  
16 the deposition.

17 Q. Do you recall that repeatedly in response to those  
18 questions about harm or injury, you said you couldn't answer?

19 A. I do.

20 Q. And why is that?

21 A. Yeah, so the terms "harm" and "injury," they're not words  
22 I normally use, and for me, it seemed that the question  
23 was -- had some sort of legal significance that had a special  
24 legal meaning, and so I had tried to ask the attorney for a  
25 definition so that I could answer the question, and I wasn't

Boettner, B. - Direct

1 given one.

2 Q. So are you saying here today that Cargill's activities  
3 have not affected Nuseed?

4 A. No, I'm not saying that at all.

5 Q. And what types of activities and what have their effects  
6 been, then?

7 A. Yes, so I guess one example I could give is that we're  
8 looking now for growers in Montana. Around this time of  
9 year, you start to recruit farmers to work with, and so  
10 Cargill is also looking for growers for their omega-3 canola  
11 in Montana, and we're having to compete for farmers that will  
12 grow our crop.

13 Q. Any other examples than that?

14 A. Yeah. I would say, in my interactions with the  
15 aquaculture industry, so we've been trying to move them  
16 through kind of a collaborative approach into a commercial  
17 discussion, and those discussions are being slowed down, in  
18 my opinion, in part, because Cargill is very active in the  
19 market.

20 Q. And at your deposition, was it your testimony that Nuseed  
21 had no plan for selling Aquaterra?

22 A. I think I remember saying that I believe Nuseed would  
23 absolutely intend to sell Aquaterra. I think the discussion  
24 around a plan was my comment was that we don't have a formal  
25 or informal business plan. It's just not how Nuseed

Boettner, B. - Direct

1 operates, and I think a lot of businesses are very successful  
2 without a formal business plan.

3 Q. And so there's just no document at Nuseed that you would  
4 call a formal or informal business plan --

5 MR. CONNALLY: Objection. Leading.

6 THE COURT: Sustained.

7 BY MR. SUNG:

8 Q. Is there a formal business plan?

9 A. No, that is what I was just trying to explain. We don't  
10 have a written business plan or strategic plan, but that  
11 certainly doesn't mean that we don't have an intent to  
12 commercialize or take this product to market.

13 Q. You were also asked during deposition whether Nuseed has  
14 a sales team. Do you remember that?

15 A. I do.

16 Q. And do you recall what your answer to that was?

17 A. Yes. I said we didn't have a sales team, which we don't.

18 Q. And how can you not have a sales team as a company that's  
19 going to move forward with commercialization?

20 A. Yeah. So I think the most important thing to understand  
21 is that this industry, especially the market that we're  
22 focused on, which is salmon and trout feed, is made up of a  
23 small number of companies. There's probably four or five  
24 that would be seed suppliers. And on the farming side,  
25 there's maybe 10 or 12 in Chile that we're focusing on. And

—Boettner, B. - Direct—

1 so I've been working for the last three years to build strong  
2 relationships in that market, and it's easily something that  
3 I can handle.

4 Q. And since your deposition, has Nuseed hired any  
5 individuals that you would consider part of a sales team?

6 A. Yes. Last week, I extended an offer that was accepted to  
7 someone in Chile that will be a business lead for aquaculture  
8 in Chile, and so a part of his role will be to help sell  
9 Aquaterra into the market.

10 Q. And so let's come back to sort of step one.

11 What is your present job title at Nuseed?

12 A. My job title today is global general manager, omega-3.

13 Q. And in that role, what do you do?

14 A. So in addition to the work I was doing to develop the  
15 market, I now have taken on responsibility for supply chain  
16 and regulatory work. It, in essence, is full responsibility  
17 for the business now.

18 Q. And prior to assuming this role, what was your previous  
19 job title?

20 A. My title before was global lead for commercial strategy,  
21 omega-3.

22 Q. And were those the only two job titles you've held at  
23 Nuseed?

24 A. Yes.

25 Q. And so what did you do prior to Nuseed?

Boettner, B. - Direct

1 A. Just before joining Nuseed, I was with a consulting  
2 company called Lismore Advisors.

3 Q. And what did you do at Lismore?

4 A. Well, we did a wide range of consulting work, mostly  
5 focused on market assessments and helping companies think  
6 about strategic planning.

7 Q. Was Nuseed one of your clients while you were at Lismore?

8 A. They were.

9 Q. And do you recall when you joined Nuseed?

10 A. I joined in 2016. I think it was March.

11 Q. And who do you report to directly today?

12 A. I report to Brent Zacharias.

13 Q. And you're aware that he testified as a witness at this  
14 trial earlier; is that correct?

15 A. That's my understanding.

16 Q. Now, what is your -- well, let me ask you:

17 How many direct reports do you have right now in  
18 your present job?

19 A. In my new position, I now have three direct reports, and  
20 they have people reporting to them, as well, so I think it's  
21 a total of eight or nine with the new hire.

22 Q. So what is your general understanding of the aquaculture  
23 industry? What is aquaculture?

24 A. So aquaculture, I guess, in its simplest sense, is  
25 farming of fish and a whole lot of different species and

—Boettner, B. - Direct—

1 shrimp. So fish, that's tilapia, carp, cod. It's a whole  
2 range of different species that are farmed. The aquaculture  
3 industry within the -- all of the companies that are needed  
4 to support that industry. So it would be the processing  
5 plants, the equipment makers that provide nets, the aquafeed  
6 companies. So holistically, it's everything that goes into  
7 farming fish and shrimp.

8 Q. And is it part of your job responsibilities to maintain  
9 an awareness of developments in this industry?

10 A. Yes, it definitely is.

11 Q. And how do you do that?

12 A. I do that in a lot of different ways. I get daily  
13 newsletters, electronic newsletters. I attend conferences.  
14 I'm in discussions with the industry. I also have some  
15 consultants that are working in Chile. So they're in regular  
16 contact with me. I have a weekly call. So it's through a  
17 whole range of different ways.

18 Q. So have you been down to Chile to see these fish farms  
19 and other components of the aquaculture industry?

20 A. I have. I've been to Chile many times.

21 Q. Can you give us a sense about what these fish farms are  
22 like from a size or scope?

23 A. Yeah. So they're much larger than you would expect.  
24 They're huge. I'm trying to picture in this room the size of  
25 a net pen, but you would have -- usually, one site would have

—Boettner, B. - Direct—

1 two sites to it. So it has nets, what they call pens, and  
2 it's probably the size of the circumference here each, and  
3 then it's divided in -- each cage or pen has 50,000 to  
4 100,000 fish in it. So the whole site might have 800,000 to  
5 a million fish that are being farmed on just one site.

6 Q. And so this is out in the saltwater part?

7 A. Yeah, out in a bay typically where it's a little  
8 protected from the ocean.

9 Q. So let's shift a little bit to the Nuseed's product,  
10 Aquaterra.

11 Can you describe what Aquaterra is?

12 A. Yeah. So, first of all, Aquaterra is the brand name for  
13 the omega-3 canola oil that we plan to sell to aquaculture.  
14 I'm guessing that there's been some discussion about that  
15 product, but it has, in my opinion, unique fatty acid  
16 profile, high DHA and high ALA, so high total omega-3, which  
17 is very appealing to the industry.

18 Q. And do you plan to sell Aquaterra to the fish feed  
19 suppliers in Chile?

20 A. Yes.

21 Q. If I could refer you to a tab in your binder in front of  
22 you. It is CX-0928. CX-0928.

23 MR. CONNALLY: Objection, Your Honor. May we  
24 approach?

25 THE COURT: All right.



—Boettner, B. - Direct—

1 MR. CONNALLY: Hearsay, foundation.

2 (The following was heard at sidebar:)

3 MR. CONNALLY: Two issues, Your Honor. First is an  
4 evidentiary issue. All the exhibits they've marked are all  
5 hearsay documents, none of which -- I'm not sure if this  
6 witness would have foundation for, and she testified at her  
7 deposition she didn't know any of the background for any of  
8 these things. She didn't know what their sales or sales  
9 plans were. She didn't know any of the logistics around what  
10 they were growing, how many acres they were growing, anything  
11 like that. She didn't know any of this, and now she is going  
12 to offer a series of hearsay documents, none of which that  
13 she's the author of, as far as I could see, to testify all  
14 about future damages, as far as I can tell.

15 So evidentiarily, it's improper. And then your  
16 order was this proceeding is limited to past damages. This  
17 has nothing to do with past damages.

18 MR. SUNG: Sorry. I was just about to lay the  
19 foundation, Your Honor, for how she has been involved with  
20 certain portions of these documents, and we would limit our  
21 questioning to those portions. I think the answer she gave  
22 at her deposition about not knowing certain aspects were not  
23 about not knowing the document, they're not knowing certain  
24 topics that might have been discussed in those documents.  
25 What I can say is that we'll be brief in terms of going

—Boettner, B. - Direct—

1 through this particular document on very discrete points, but  
2 I think you'll see our foundation.

3 THE COURT: Well, it looks like the documents refer  
4 to their plan for future sales as opposed to having anything  
5 to do with damages that they've suffered up until now.

6 MR. SUNG: Well, I think part of this is also  
7 background information. It's not a matter of simply whether  
8 or not these relate to past damages or future damages. All I  
9 can say is if you offer a little latitude on this --

10 THE COURT: Well, all these plans, I mean, how have  
11 your plans for marketing your product been affected by all  
12 these documents?

13 MR. SUNG: Well, this particular document is going  
14 to show the specific customers that we have been trying to  
15 sell to at this point in time, Your Honor.

16 THE COURT: All right. But you don't have anything  
17 to sell.

18 MR. SUNG: Well, we are trying to sell. I think  
19 that's the relevant aspect about it.

20 THE COURT: Well, the evidence was clear that they  
21 did not have a product ready for market.

22 MR. SUNG: Well, we have a product ready for market.  
23 We haven't sold a product yet.

24 THE COURT: That's not the way I understood her  
25 testimony here in the trial. They had not tried to sell the

—Boettner, B. - Direct—

1 product. They didn't have any plans to sell. So their plans  
2 are not relevant to this portion of the damage hearing. Did  
3 I hear you say you were asking for \$1.2 million? Is that for  
4 royalties?

5 MR. SUNG: No. That is what the opponents' expert  
6 will be testifying is the appropriate royalty.

7 MR. DILLON: For future royalties.

8 MS. SHAW: Your Honor, yes, our expert will be  
9 providing opinion that for future damages, the royalty rate  
10 should be 1.4 percent plus an upfront payment of \$1.235  
11 million. But they will be opining, for past damages, that  
12 the payment should be zero.

13 THE COURT: Where did the 1.235 million come from?

14 MS. SHAW: Your Honor, I spoke in my opening --

15 THE COURT: From your expert?

16 MS. SHAW: Yes, Your Honor.

17 THE COURT: And it has to do with future damages?

18 MS. SHAW: Yes, Your Honor.

19 THE COURT: All right. We've got to focus on future  
20 damages, and based on her testimony, I don't think she's in a  
21 position to say that they've lost sales up until this point.

22 MR. SUNG: That is correct, Your Honor. It wouldn't  
23 be a lost sale, but what she has said is that Nuseed does --  
24 while it doesn't have a formal business plan, it intends to  
25 sell this product, and we would just like an opportunity to

~~Boettner, B. - Direct~~

1 talk about who we are trying to sell this product to.

2 THE COURT: Okay. You can do that without these  
3 documents.

4 MR. SUNG: That's fine, Your Honor.

5 MR. CONNALLY: Exactly, Your Honor. My concern  
6 would be that she can testify as to what she knows, but she  
7 can't admit these documents that she doesn't --

8 THE COURT: Well, I think the point is well taken.

9 MR. SUNG: Thank you, Your Honor.

10 (The following was heard in open court:)

11 BY MR. SUNG:

12 Q. Ms. Boettner, in your work in, as you've mentioned,  
13 engaging the aquaculture industry, are there particular fish  
14 feed suppliers you've engaged in Chile?

15 A. Yes. Several.

16 Q. And can you describe who they are and what they do?

17 A. Yeah, sure. So aquafeed suppliers are companies that  
18 produce feed for, as I mentioned before, salmon farms. There  
19 are, in Chile, four or five. The two largest are Skretting  
20 and Biomar, which are global feed markets. They're  
21 headquartered out of Norway, but they operate globally, and  
22 they have production facilities in Chile.

23 And then AquaChile would probably be the next  
24 largest. So AquaChile is a company that produces feed for  
25 itself. So it's actually a salmon farmer, and they've

—Boettner, B. - Direct—

1 decided that rather than buying all their feed externally,  
2 they're manufacturing feed for themselves. And what is  
3 interesting about AquaChile is within the past year, they've  
4 acquired a number of large salmon farms. And so by next  
5 year, they'll be producing as much feed as Skretting and  
6 Biomar in Chile. So they're going to become a very  
7 significant player.

8 And then there is Salmofood which operates only in  
9 Chile and sells feeds to the salmon farms locally. And  
10 another company called Salmenes Antarctica, which is also  
11 producing feed for itself, but they also produce some extra  
12 feed that they either export or sell to other farms.

13 Q. So have you personally engaged all of these companies  
14 with respect to your discussions about Aquaterra?

15 A. Yes, I have. For the past three years, I've been  
16 building relationships with each of these companies. That's  
17 my job, and so I've spent a lot of my time trying to develop  
18 the right relationship at different levels within the  
19 company.

20 Q. And are you aware of a division of Cargill known as  
21 Cargill Aqua Nutrition?

22 A. Yes, I'm familiar with Cargill Aqua Nutrition. I know it  
23 a little bit better as EWOS.

24 Q. And is EWOS a company that Cargill had purchased?

25 A. Yes. So EWOS would have been the third largest global or

—Boettner, B. - Direct—

1 was/is the third largest feed supplier in the world again.

2 They were, at the time that they were acquired, headquartered  
3 in Norway. They were required by Cargill.

4 Q. And so when I asked you earlier about the different  
5 companies that you had talked to and are aware of in the  
6 Chilean aquaculture industry, how come you didn't mention  
7 Cargill Aqua Nutrition?

8 A. Because I don't see them as a potential customer since  
9 they were acquired by Cargill. They'll be buying Latitude.  
10 They'll be buying ingredients from their raw materials  
11 counterparts in the company.

12 Q. Has Nuseed been engaged in working with Chilean fish  
13 farmers with respect to its Aquaterra product already?

14 A. Yes, we -- so from -- I'm not quite sure how you're  
15 asking the question, but we've been working to educate the  
16 farms. So even though we won't be selling directly to farms,  
17 we've been working very hard to educate them on Aquaterra and  
18 how to use the product and what it is. And we've been --  
19 we've been engaged with a few of them on some trials of the  
20 product, some trying out the product at their farms.

21 Q. And can you describe what that -- those trials are like?

22 A. Yes. So we have -- we have three trials that we started  
23 a year ago, so three different farms in three different feed  
24 suppliers. So it's a three-way collaboration between Nuseed,  
25 a feed supplier, and a farm.

Boettner, B. - Direct

1           And what we agreed was that the farms were  
2 interested, as I said, in trying or testing the product, so  
3 we provided oil. And feed was produced for a site that the  
4 farm selected, and the fish were -- well, we were replacing a  
5 portion of the fish oil in each of these trials, and so these  
6 fish have been eating that feed for somewhere between 9 to 12  
7 months.

8 Q. And when you talk about the Aquaterra that was used for  
9 these trials, how much are we talking about?

10 A. So each of the trials was a little bit different, but I  
11 would say somewhere between 50 to 100 tons for each trial.  
12 So a total of maybe 300 tons was delivered to these trials.

13           You have to remember, this was on a commercial site.  
14 So these are live production sites that are actually farming  
15 the salmon with the intention of selling them into the  
16 market, and we were replacing fish oil for half the fish on  
17 each of these sites. So somewhere in the order of maybe a  
18 million, million and a half fish were receiving an Aquaterra  
19 diet.

20 Q. So to be clear, you didn't sell Aquaterra to these fish  
21 feed manufacturers of fish farmers, did you?

22 A. No. That's right. We contributed the oil free of  
23 charge. Again, I was trying to describe it was a three-way  
24 partnership. So we delivered oil free of charge. Everybody  
25 was contributing something to the task. The feed suppliers

—Boettner, B. - Direct—

1 were producing a specialty feed in this case, because it's  
2 not a commercial feed yet, and the farms were selecting a  
3 site and doing all the operations of doing kind of a test on  
4 a live production site, which had its own challenges.

5 Q. Even though you're giving away Aquaterra for free,  
6 doesn't it cost you something?

7 A. It cost us a lot, yeah; I would say in the millions.  
8 Between producing the oil -- growing the crop, producing the  
9 oil, getting the oil down there, managing storage and  
10 transport, it cost us a lot of money.

11 Q. Is Nuseed marketing Aquaterra as an alternative to fish  
12 oil?

13 A. Yes.

14 Q. And are you aware of what the current price is of fish  
15 oil?

16 A. I am. I get a regular -- it's one of the regular news  
17 feeds that I get, and over the weekend, the update came  
18 across, and it's still at \$1,900 a metric ton.

19 Q. Now, you mentioned you're also responsible to Nuseed for  
20 regulatory matters; is that correct?

21 A. I am. I'm generally aware, but I'm not specifically  
22 close to some of the regulatory work. I have someone now  
23 reporting to me that is responsible for that work.

24 Q. And are you aware of Nuseed's regulatory filings to the  
25 FDA for approval for human food and animal feed use?



—Boettner, B. - Direct—

1 A. Yes. Yes.

2 Q. And have you obtained FDA approval yet?

3 A. Not yet. We're still waiting.

4 Q. And if we can turn to tab CX-1723 in your binder.

5 MR. CONNALLY: Objection. Foundation. Hearsay.

6 THE COURT: Do you recognize this document?

7 THE WITNESS: I do. I helped put it together.

8 THE COURT: Overruled.

9 BY MR. SUNG:

10 Q. What is this document, Ms. Boettner?

11 A. So this document is in what we call an infographic. We  
12 put it together to help educate the market about omega-3 oil  
13 since it's a very new space for our company.

14 Q. And is this the type of document that would be created in  
15 the ordinary course of business at Nuseed?

16 A. It would be.

17 Q. And is this the type of document that would be maintained  
18 in the ordinary course of business at Nuseed?

19 A. Yes.

20 MR. SUNG: Your Honor, we move the admission of this  
21 exhibit into evidence.

22 THE COURT: That document will be admitted.

23 (Exhibit CX-1723 received in evidence.)

24 BY MR. SUNG:

25 Q. Ms. Boettner, can you describe what we're seeing in this

—Boettner, B. - Direct—

1 infographic?

2 A. Yes, I can. So what it's showing is really the market  
3 for omega-3 oil, how all the different ways that omega-3 oils  
4 are used. You can see that we have a value, estimate for the  
5 market of \$3.2 billion.

6 THE COURT: Well, we're not interested in what  
7 somebody estimates the future market to be. What we're  
8 interested in is what damage the proponents have suffered up  
9 until today. So if this is a document that you produced in  
10 your efforts to create a market, that's fine, but we're not  
11 interested in any projections for future sales.

12 THE WITNESS: Okay. Understood, Your Honor. I  
13 guess I can just then comment that it was showing, as well,  
14 the consumption of omega-3 oil. So about two-thirds of the  
15 oil goes to aquaculture, and about one-third goes to human  
16 consumption, like dietary supplements. You're probably  
17 familiar with fish oil pills. Some foods are fortified with  
18 omega-3, and then also some omega-3 oil goes into  
19 pharmaceutical use.

20 BY MR. SUNG:

21 Q. If I can refer you to the lower portion of that  
22 particular infographic. Are you familiar with a term "fish  
23 oil deficit"?

24 A. I am, yes.

25 Q. And what does that term mean to you?

—Boettner, B. - Direct—

1 A. So to me a fish oil deficit is a situation at any point  
2 in time where there's more -- there's not enough omega-3 oil  
3 for what the market needs or wants.

4 Q. And turning to this infographic, I think you can see on  
5 the screen there a section that's labeled "deficit." Can you  
6 tell us what that means?

7 A. Yeah. So this chart is showing, on the bottom line,  
8 supply, so how much of fish oil is available over a period of  
9 time, or expected to be available, and then the top line,  
10 which is what I was defining as market need, so at any point  
11 in time, or over time, how much fish oil the market might  
12 need, and then the yellow bars are representing the deficit.

13 Q. So am I seeing here correctly that there are portions  
14 that are narrower and portions that are larger? What is that  
15 all about?

16 A. Yes. So a deficit is not static. It's something that  
17 changes all the time for a lot of different reasons. You can  
18 see -- you can see a narrowing there around 2016. That -- a  
19 large contribution to that narrowing was that there was a  
20 significant algae bloom in Chile that affected the farms, and  
21 so the number of fish being farmed was quite a bit lower, and  
22 so the feed they needed and the omega-3 oil that would be  
23 needed for the feed was quite a bit lower that year.

24 Q. And is it your understanding that Nuseed can meet the  
25 demand for omega-3 fish oil that's reflected in these

—Boettner, B. - Direct—

1 deficits?

2 MR. CONNALLY: Objection. Leading.

3 THE COURT: Sustained.

4 BY MR. SUNG:

5 Q. What is your understanding of Nuseed's capabilities with  
6 regard to supplying fish oil replacements?

7 MR. CONNALLY: Objection. Lack of foundation.

8 THE COURT: Overruled.

9 THE WITNESS: So my -- so -- can you repeat the  
10 question?

11 BY MR. SUNG:

12 Q. Yeah. What is your -- let me ask it another way.

13 Do you have an understanding as to Nuseed's ability  
14 to meet the supply of fish oil based on the demand that's  
15 present?

16 A. Yeah. I guess I would say I think that Nuseed plans to  
17 fill the deficits, that one of our goals is to meet the  
18 market's needs.

19 Q. And how can you be so confident that Nuseed can meet the  
20 demand for omega-3 fish oil?

21 A. Because we've already shown scaleability. So we grew  
22 3,000 acres of the crop in 2017, and then we tripled that in  
23 2018. This year we planted 35,000 acres of omega-3 canola,  
24 and right now, we're in discussions internally where we're  
25 planning for next year, and we're probably going to double it

~~Boettner, B. - Cross~~

1 again to 65,000 acres or more maybe.

2 MR. SUNG: Okay. Thank you. I pass the witness.

3 MR. CONNALLY: Your Honor, may I proceed?

4 THE COURT: You may.

5 CROSS-EXAMINATION

6 BY MR. CONNALLY:

7 Q. Good morning, Ms. Boettner. I'm Tom Connally. I work  
8 for Hogan Lovells, and I represent BASF. We've not met  
9 before, so welcome to the courtroom.

10 So you joined Nuseed in 2016, right?

11 A. That's right.

12 Q. And before you joined as an employee, you were working as  
13 a consultant for Nuseed, right?

14 A. I was -- yes, I was working for Lismore Advisors, and  
15 Nuseed was a client.

16 Q. And you were -- when you were working at Lismore, you  
17 were working on the omega-3 project, right?

18 A. Yes, I was.

19 Q. And then you joined Nuseed in 2016, and you were the  
20 global lead for commercial strategy, correct?

21 A. That's correct.

22 Q. And then recently you were promoted to -- what is your  
23 new title?

24 A. Global general manager, omega-3.

25 Q. And that was in late August?

—Boettner, B. - Cross—

1 A. Yeah. It was end of August/beginning of September.

2 Q. So you've been working on the omega-3 project for three  
3 years?

4 A. Three years while I was an employee of Nuseed, yes.

5 Q. And then how long while you were at Lismore?

6 A. Probably 12 to 18 months before that, year and a half, I  
7 think, we were working on the project with Nuseed.

8 Q. So you've been working on the omega-3 project for about  
9 four-and-a-half years; is that right?

10 A. Yes. But not full time.

11 Q. You've been working full time for about three years, and  
12 you've been working on the project for about four-and-a-half;  
13 is that correct?

14 A. That's correct.

15 Q. And right now, you report directly to Brent Zacharias; is  
16 that right?

17 A. I do.

18 Q. Now, you don't have a technical background; is that  
19 correct?

20 A. I'm not sure what you mean by a technical background.

21 But I don't have a degree. I don't have a science degree.

22 But I spent -- I started my career in pharmaceuticals and

23 spent quite a bit of time with healthcare technology

24 companies. So I've been in a technical space for quite some

25 time in my career.

Boettner, B. - Cross

1 Q. But you testified at your deposition you didn't have a  
2 technical background; is that correct?

3 Let me give you the specific cite. You should have  
4 your deposition in the back there. It should be under the  
5 deposition tab. And if I could refer you to Page 74.

6 THE COURT: Wait a minute. 74?

7 MR. CONNALLY: Correct. At the bottom. Starting at  
8 line 24, continuing on through line 4 on Page 75.

9 THE WITNESS: I'm sorry. I'm looking at the small  
10 page numbers?

11 BY MR. CONNALLY:

12 Q. Correct, yes.

13 A. Okay.

14 Q. And you see on lines 3 and 4 on 75, you say you don't  
15 have a technical background?

16 A. I'm sorry. I just don't think I'm on the right page.  
17 Page 74, line 3 is about --

18 Q. No, 74, line 24, and then going down to immediately below  
19 that, Page 75, lines 3 and 4.

20 A. Okay. Yes. I see that.

21 Q. And you testified you don't have a technical background,  
22 correct?

23 A. I did.

24 Q. Okay. It's been very clear that Nuseed is not currently  
25 selling Aquaterra, correct?

Boettner, B. - Cross

1 A. That's correct.

2 Q. And Nuseed is not selling any product derived from its  
3 omega-3 canola crops, correct?

4 A. Not that I'm aware of, not right now, no.

5 Q. And you don't know if Nuseed is going to sell Aquaterra  
6 in 2020, do you?

7 A. It would be impossible to know if we will because that's  
8 a future projection. I can only repeat that I have every  
9 plan to sell Aquaterra within the next six months.

10 Q. You don't know if Nuseed is going to sell any product  
11 derived from its omega-3 canola crops in 2020, correct?

12 A. That's right. As I just said, I think it's very hard to  
13 predict what will happen in 2020. I can only speak to our  
14 intent to sell it.

15 Q. And since it's made no sales, Nuseed hasn't paid CSIRO or  
16 GRDC any royalties, correct?

17 A. It's not an area I'm familiar with, if payments have been  
18 made to our partners.

19 Q. So you don't know?

20 A. No, I wouldn't know that. I'm not --

21 Q. Okay. You're the global head of the omega-3 program.  
22 Who would know if you don't know?

23 A. I would say that if there were payments that were made,  
24 our CFO would know, our group executive, Brent Zacharias,  
25 would know. Again, I've been in this job for two months, and



—Boettner, B. - Cross—

1 the financial relationship that we have with our  
2 collaborating partners is not something that I've been  
3 involved with in the past.

4 Q. Right. But you've been working there for three years on  
5 the project, right?

6 A. That's correct; I have been. As I said, but this is not  
7 an area that I've been involved with.

8 Q. And you are the global manager for the omega-3 project,  
9 and you don't know if they've paid any royalties to CSIRO or  
10 GRDC? Is that your testimony? Just want to make sure.

11 A. That's what I said. I'm not familiar with this area. I  
12 wouldn't be aware if a payment had been made because it would  
13 now become part of my new responsibilities. It wasn't  
14 something that I was involved with in my prior  
15 responsibilities.

16 Q. But you've been on this job for a month and a half now,  
17 right?

18 A. That's right.

19 Q. And you still don't know?

20 A. I think I've said that I don't know.

21 Q. Okay. And you're not aware of any contracts that Nuseed  
22 has to sell Aquaterra, correct?

23 A. I'm not aware that Nuseed has any contracts, no.

24 Q. And you're not aware of any contracts Nuseed has to sell  
25 Nutriterra or any product for human consumption, correct?

—Boettner, B. - Cross—

1 A. Correct. I'm not aware that they have any contracts for  
2 Nutriterra.

3 Q. And there's no regulatory approval to sell products for  
4 human consumption, correct?

5 A. On the human consumption side in the United States, our  
6 FDA application is pending, and we would need that to sell --  
7 they regulate whether people can consume a new ingredient  
8 like ours. So we would need that before we could have sales  
9 or contracts; that's correct.

10 Q. So on September 9th, when Ms. Shaw took your deposition,  
11 you weren't aware of anyone at Nuseed who was responsible for  
12 negotiating contracts for the purchase of Aquaterra, correct?

13 A. Yes. I remember that part of the deposition, yes.

14 Q. And that was true at the time?

15 A. That was true at the time.

16 Q. And you're suggesting that's changed now?

17 A. Yeah. So we're not yet in a negotiation phase for  
18 contracts. So what we have been doing, as I said, is working  
19 very collaboratively with the industry so that we can  
20 determine how they would want to use our product, and I'm  
21 moving forward now with a commercial discussion where we're  
22 trying to understand what volume they might want to take,  
23 what price they might be willing to pay, and both of those  
24 are related. And once we have a better sense of that, then  
25 my plan is to move into a negotiation with them.

—Boettner, B. - Cross—

1 Q. But there's no negotiations currently ongoing?

2 A. No. There's a commercial discussion, but no formal  
3 negotiations, but there are commercial conversations.

4 Q. And as of September, you didn't have anyone responsible  
5 for negotiations, correct?

6 A. I remember saying that in the deposition, yes.

7 Q. And that was true, right?

8 A. Of course, yes.

9 Q. Nuseed doesn't have a formal strategic plan? I think --  
10 your direct testimony was a little strange. So Nuseed  
11 doesn't have a formal strategic plan for the Aquaterra  
12 product, correct?

13 A. What I was trying to explain is that we don't have a  
14 formal or informal. We don't have a written business plan or  
15 strategic plan. But that doesn't mean that we don't have a  
16 plan for Aquaterra. There are a lot of businesses that  
17 operate without a business plan, quite successfully, and at  
18 Nuseed, one of the things we want to do is stay very  
19 flexible. As we get feedback from our customers, we want to  
20 be able to adjust to changes in the market, and so we don't  
21 operate with a strict business plan, no.

22 Q. So you don't have any plan written down?

23 A. There are components of our plan, but there's no written  
24 plan, no.

25 Q. Okay. So do you believe Nuseed's omega-3 project is a

Boettner, B. - Cross

1 bet-the-farm project?

2 A. I'm sorry?

3 Q. Is it a bet-the-farm project?

4 A. It's a what farm?

5 Q. Is it a bet-the-farm project? Is it a very important --

6 A. I'm sorry?

7 Q. -- bet-the-company kind of project?

8 A. Not at all. I wouldn't describe it that way at all. As  
9 I said, I've been working three years to develop strong  
10 relationships, deep relationships with the industry in Chile.  
11 I've traveled there many times. I have consultants that work  
12 for me in Chile. We've invested in clinical trials with  
13 Nutriterra.

14 So we have patients today taking capsules to see  
15 what the absorption is of Nutriterra to prepare our files for  
16 additional filings for that side of the business. So it's  
17 hardly -- I'm not sure how you're using the term, but I  
18 wouldn't say "bet the farm." It's a very intentional  
19 movement towards the market.

20 Q. Okay. Do you have a price for the Aquaterra product?

21 A. We haven't set a price. I was trying to describe just  
22 now. We're in a discussion with customers that is related to  
23 how much volume of the oil they might take, and that relates  
24 to the price because it's related to scale and a whole host  
25 of other things.

Boettner, B. - Cross

1 Q. Okay. You have no understanding of the logistics  
2 associated with Nuseed's omega oil, right?

3 A. I have some understanding. I'm generally aware, but it's  
4 not my primary responsibility. In the last two months, when  
5 I took on this job, I now have someone reporting to me on  
6 supply chain. So I've been coming up to speed on some of  
7 those requirements.

8 Q. Okay. And, in fact, you'd just be speculating when you  
9 talk about logistics for the project, correct?

10 A. I wouldn't be just speculating. As I said, I have  
11 someone reporting to me that is responsible for planting the  
12 crop, working with growers, harvesting the crop, delivering  
13 that grain to storage, so -- and I've been in those  
14 discussions for the last two months. It's a new area for me,  
15 but I wouldn't be speculating. My view today would be on --  
16 based on what I've learned over the last two months working  
17 with him.

18 Q. Mr. Sparks, can we play the clip from Page 106 of the  
19 deposition. Wait till the Court is there.

20 It's 106, line 3 through line 12, Your Honor.

21 (A video was played in open court.)

22 MR. CONNALLY: Continue on, Mr. Sparks.

23 (A video was played in open court.)

24 BY MR. CONNALLY:

25 Q. Ms. Boettner, you don't know what steps Nuseed has taken

Boettner, B. - Cross

1 to be prepared to plant crops, correct?

2 A. At the time of my deposition, as I said, I didn't have a  
3 lot of information, because it was not my area of  
4 responsibility. That was my colleague's, supply chain  
5 colleague's.

6 In the last -- in the last two months in my new job,  
7 I've spent a lot of time trying to understand better exactly  
8 where we are and what is going to be required to get the oil  
9 to the market.

10 Q. And at your deposition, you also didn't know what steps  
11 Nuseed had taken to prepare to harvest the crop, correct?

12 A. At my deposition, I was not familiar with the work that  
13 had been done, no.

14 Q. Okay. And you don't know how many acres of canola Nuseed  
15 currently has planted in North America, do you?

16 A. I don't know -- I don't know exactly how many acres were  
17 planted. I know that we went out to secure 35,000 acres. I  
18 think around 30,000 were actually planted.

19 Q. So you don't know how many acres of crops Nuseed will  
20 harvest in 2019; isn't that right?

21 A. That's correct. The harvest isn't complete yet. The  
22 harvest has been ongoing in Montana, but North Dakota had  
23 some weather delays, so the harvest isn't complete. So I  
24 don't know how many acres will be harvested.

25 Q. And you don't know who is going to be harvesting those

Boettner, B. - Cross

1 2019 crops, do you?

2 A. Those crops -- yes, I do. Those crops will be harvested  
3 by our farmer partners, the growers that are growing the crop  
4 for us.

5 Q. Okay.

6 MR. CONNALLY: Your Honor, I'd like to play a clip  
7 from Page 114, lines 20 through 25.

8 THE COURT: All right.

9 (A video was played in open court.)

10 MR. CONNALLY: Go to lines 23 through 25, if you  
11 have them.

12 All right, I'll move on.

13 BY MR. CONNALLY:

14 Q. You don't know if Nuseed has any contracts in place with  
15 farms to plant omega-3 canola crops in the future, correct?

16 A. I do know that we don't have any contracts in place,  
17 because, as I mentioned a little while ago, it's around  
18 October, November that the companies go out to start planning  
19 for contracting for the next year's crop. So we're just now  
20 starting those discussions with farmers.

21 Q. Okay. You haven't had any discussions with any aquafeed  
22 suppliers regarding purchasing something from Nuseed, have  
23 you?

24 A. So I'm in active dialogue right now with aquafeed  
25 companies, and we're starting to shift our conversations to

—Boettner, B. - Cross—

1 what I hope will become a sale and a contract for Aquaterra.

2 MR. CONNALLY: Your Honor, I'd like to play a clip  
3 from 90-91, starting on Page 90, line 25, through 91, line 3.

4 THE COURT: 90.

5 MR. CONNALLY: Page 90, line 25.

6 THE COURT: I think that we should note that the  
7 deposition was taken on September 9th of this year.

8 MR. CONNALLY: Thank you, Your Honor.

9 THE COURT: Where are you on Page 90?

10 MR. CONNALLY: Starting on line 25.

11 THE COURT: All right.

12 (A video was played in open court.)

13 BY MR. CONNALLY:

14 Q. And you also haven't had any conversations with aquafeed  
15 suppliers about them entering into agreements to purchase  
16 something from Nuseed, correct?

17 A. No. As I've been trying to describe, we haven't yet  
18 reached the stage where we're negotiating a contract or where  
19 a customer said, I'm ready to buy.

20 What we're doing is going through a conversation  
21 where I'm trying to determine how much oil they might want  
22 and when that might start, what kind of delivery schedule,  
23 and all of that will determine a price. And so, no. Right  
24 now, no.

25 Q. Okay. So Nuseed has used the omega-3 oil it has produced



Boettner, B. - Cross

1 so far for testing and customer trials, right?

2 A. Most of the oil has gone -- a large volume of the oil has  
3 gone to the trials in Chile that I was describing before.

4 Q. And that was for free, I believe you testified, correct?

5 A. Yes, I said that was delivered free of charge, as a  
6 contribution to the trials.

7 Q. Right. But none of the aquafeed manufacturers who have  
8 tried Aquaterra have told you they're interested in  
9 purchasing Aquaterra, have they?

10 A. The fact that -- we're moving forward with commercial  
11 conversations, so they're very interested in having a  
12 discussion about our pricing. They've started to ask what  
13 that might be. They're very interested in sourcing Aquaterra  
14 as an omega-3 oil option.

15 Q. Have you talked to Skretting?

16 A. Skretting, yes.

17 Q. Sorry.

18 A. Yes, I'm in a conversation with Skretting now.

19 Q. Okay. And Skretting hasn't told you that it wants to  
20 purchase Aquaterra, has it?

21 A. So what -- they haven't directly said, We're ready to  
22 buy, but we continue to advance our conversations in that  
23 direction. I have another call with them tomorrow morning  
24 where we start to narrow the conversation, as I've been  
25 trying to describe, on how much volume. They've had to --

~~Boettner, B. - Cross~~

1 they've had to make some decisions about how they might use  
2 the ingredients.

3           So when you're formulating feed, you have to decide  
4 how much of it would you use, how much of the fish oil you're  
5 replacing. They're trying to decide do they want oil just in  
6 Chile, or do they want oil also delivered to Canada. So  
7 we're not at the point where they're saying, Okay, we're  
8 ready to move into a contract negotiation.

9 Q. And, similarly, Los Fiordes has not told you that it  
10 wants to purchase Aquaterra, either, has it?

11 A. Again, they've not specifically said the words, "We want  
12 to purchase Aquaterra." That doesn't mean that they aren't  
13 interested in buying the product. They've been extremely  
14 interested. They would not have, in my opinion, conducted a  
15 trial with our product. They were one of our farm partners,  
16 and if you think about 800,000 to a million fish on that  
17 site, half of which are getting Aquaterra, that's valuable  
18 inventory, and they're testing a new ingredient, and they're  
19 doing that with the intention of using that ingredient.

20           MR. CONNALLY: Your Honor, I'd like to play  
21 Page 100, line 15 through 101, line 2.

22           THE COURT: All right.

23           (A video was played in open court.)

24 BY MR. CONNALLY:

25 Q. Now, you've never estimated how much Aquaterra oil Nuseed

Boettner, B. - Cross

1 could make, have you?

2 A. No. I have not done a calculation of how much Aquaterra  
3 Nuseed could make, no.

4 Q. And you don't know if anyone at Nuseed has made any  
5 projections related to how much Aquaterra oil Nuseed could  
6 make, right?

7 A. No, I don't know. Someone may have, but I don't know.

8 Q. And you've never had discussions with anyone at Nuseed  
9 about the maximum amount of Aquaterra oil Nuseed could  
10 produce, correct?

11 A. The only discussions that we've had are that we are --  
12 it's an easily scaleable product, and we plan to fill as much  
13 of the deficit as we possibly can.

14 Q. And you've never made any projections on Nuseed's costs  
15 related to Aquaterra, have you?

16 A. I haven't. It's now my new responsibility -- my supply  
17 chain colleague is responsible for calculating our cost of  
18 goods, and so I've been working much more closely with our  
19 cost estimates.

20 Q. You don't know if another company selling omega-3 oil  
21 will affect Nuseed's plans to sell Aquaterra, correct?

22 A. I -- I do know that another company selling omega-3 oil  
23 would affect, but without knowing specifically what those  
24 plans are...

25 I think you're probably referring back to my

—Boettner, B. - Cross—

1 deposition, and without having plans described or knowing  
2 what customers they're targeting, then you can't know the  
3 exact effect. But, of course, another company selling  
4 omega-3 canola oil or omega-3 oils is something we're going  
5 to compete with.

6 Q. Okay.

7 MR. CONNALLY: Your Honor, I'd like to play Page 204  
8 to 205, lines 22 on 204 through lines 10 of 25.

9 THE COURT: 204, line what?

10 MR. CONNALLY: 22 -- sorry -- through 10 on 205.

11 THE COURT: All right.

12 (A video was played in open court.)

13 BY MR. CONNALLY:

14 Q. You don't know if deregulation of Cargill's Latitude has  
15 had any impact on Nuseed's plans to commercialize Aquaterra,  
16 correct?

17 A. I don't know if their deregulation specifically has had  
18 an impact. I know that Cargill has become much more active  
19 in the market, and that is absolutely having an effect.

20 Q. Okay. In fact, you don't know whether Cargill's  
21 promotion of Latitude to the industry has had any impact on  
22 Nuseed's plan to commercialize Aquaterra, correct?

23 A. I believe what I was saying earlier is that I -- now that  
24 we're going out for growers in Montana, we're competing for  
25 growers in the same state. It's not a big canola-growing

—Boettner, B. - Cross—

1 region, and so that competition is going to present some  
2 challenges. And I also believe that Cargill's presence in  
3 the market, in the aquaculture market, is contributing to a  
4 slower progress on our commercialization of the product.

5 MR. CONNALLY: Your Honor, I'd like to play two  
6 clips; 250, 15 through 22 --

7 THE COURT: 250?

8 MR. CONNALLY: Let's start with 250, line 15 through  
9 line 22, a question by Mr. Dillon.

10 (A video was played in open court.)

11 MR. CONNALLY: And next I'd like to play, Your  
12 Honor, Page 251, line 12 through 252, line 1, again,  
13 questioning by Mr. Dillon.

14 THE COURT: All right.

15 (A video was played in open court.)

16 BY MR. CONNALLY:

17 Q. So, Ms. Boettner, you can't identify any impact to  
18 Nuseed's plans to commercialize Aquaterra that would result  
19 from Cargill's plans to promote or sell Latitude in the  
20 aquafeed market, correct?

21 A. I believe I just said that our ability to move forward  
22 and progress our commercial discussions with aquafeed  
23 suppliers has been delayed, it's been slow-going, and I  
24 believe, at least in part, that's contributed to by the fact  
25 that Cargill is on the market.

Boettner, B. - Cross

1 MR. CONNALLY: Your Honor, I'd like to play 252 to  
2 253, lines -- 252, line 22, to 253, line 11.

3 THE COURT: All right.

4 (A video was played in open court.)

5 THE COURT: How much longer are you going to be with  
6 this witness, Mr. Connally?

7 MR. CONNALLY: Your Honor, I've got a little bit  
8 more. I'm pausing right now to cross out some things, but I  
9 do have another -- I do have some more time, so if this is a  
10 good time for a break, let's do that.

11 THE COURT: All right. Let's go ahead and take our  
12 morning break, ladies and gentlemen.

13 (The jury exited the courtroom.)

14 THE COURT: We'll take a 20-minute recess.

15 (Recess from 11:35 a.m. to 11:55 a.m.)

16 (The jury entered the courtroom.)

17 THE COURT: You may resume.

18 MR. CONNALLY: Thank you, Your Honor. In an effort  
19 to speed things along, Mr. Sung and I have agreed to the  
20 admission of two license agreements between GRDC, CSIRO, and  
21 Nuseed. They're in the cross binder, the larger binder.  
22 CX-0181 --

23 THE COURT: CX-0181. Okay.

24 MR. CONNALLY: -- and to the admission of CX-0681, a  
25 companion license agreement.

—Boettner, B. - Cross—

1 THE COURT: CX-0681?

2 MR. CONNALLY: Correct, sir.

3 THE COURT: Those two exhibits will be admitted.

4 (Exhibits CX-0181 and CX-0681 received in evidence.)

5 MR. CONNALLY: Thank you.

6 BY MR. CONNALLY:

7 Q. Ms. Boettner, do you know Sue McIntosh?

8 A. Yes, I do.

9 Q. Okay. And she worked on Nuseed's petition for  
10 deregulation, correct?

11 A. Yes, that's correct.

12 Q. And you're aware that Ms. McIntosh obtained seeds from  
13 BASF's LFK elite event from the American Type Culture  
14 Collection for patented seeds; is that right?

15 A. No, I don't -- I'm not aware of that.

16 Q. Okay. Are you aware that Ms. McIntosh had the oil  
17 profile for the LFK event?

18 A. No.

19 Q. You can't point to any harm Nuseed has suffered based on  
20 BASF's activities to date relating to omega-3 canola,  
21 correct?

22 A. Again, I'm not familiar with the term "harm" in a legal  
23 sense. I think I was trying to explain that I think  
24 certainly Cargill's presence in the market is affecting us in  
25 several ways. One is what I've discussed, which is trying to

Boettner, B. - Cross

1 compete for growers, a limited number of growers in Montana,  
2 and the second is that our discussions with  
3 aquaculture/aquafeed companies is progressing much more  
4 slowly. And I wouldn't suggest that Cargill's presence is  
5 the only reason, but I believe Cargill is a contributing  
6 factor, because it's come up in conversations that they're  
7 now in the market, and aquafeed companies are wanting to take  
8 some time to get familiar with that product.

9 MR. CONNALLY: Your Honor, may I impeach the  
10 old-fashioned way by just reading the transcript?

11 I'm on Page 193, line 21, through line --

12 THE COURT: 193?

13 MR. CONNALLY: Correct, Your Honor, through  
14 line 21 -- actually, I'm going to start on line 19, Your  
15 Honor, on Page 193.

16 THE COURT: Line 19 on Page 193?

17 MR. CONNALLY: Correct, Your Honor.

18 BY MR. CONNALLY:

19 Q. Ms. Boettner, you can follow along in your transcript, if  
20 you'd like.

21 THE COURT: You can read the question and answer and  
22 ask her if that was her testimony.

23 MR. CONNALLY: Yes, sir. Thank you.

24 BY MR. CONNALLY:

25 Q. Are you there, Ms. Boettner?



Boettner, B. - Cross

1 A. No, I'm sorry. What was the page number?

2 Q. Page 193, in the lower right-hand corner there, on  
3 line 19.

4 A. Okay.

5 Q. Question, by Ms. Shaw: "I'm not asking a legal -- just  
6 to be clear, I'm not asking you a legal question. I'm just  
7 asking you can you point to any harm Nuseed has suffered  
8 based on BASF's activities to date relating to omega-3  
9 canola?

10 "Answer: I don't believe I can answer that  
11 question."

12 A. Yes, I see that.

13 Q. Okay. And that was your testimony, correct?

14 A. It was, but I have to clarify. I'm not very familiar  
15 with BASF's activities. I'm much more familiar with  
16 Cargill's activities.

17 Q. Okay. You can't tell us whether BASF --

18 THE COURT: Where are you?

19 MR. CONNALLY: I'm sorry, Your Honor. I'm not  
20 reading testimony, I'm asking her a question. I apologize.

21 THE COURT: All right.

22 BY MR. CONNALLY:

23 Q. You can't tell us whether BASF and Cargill have harmed  
24 Nuseed in any way, can you?

25 A. Again, "harm" -- to me, there's a legal definition to it,

—Boettner, B. - Cross—

1 considering that I was in a legal setting when I was in my  
2 deposition, I'm in a legal setting now, and so I --

3 THE COURT: I think you need to use the microphone.

4 THE WITNESS: I'm sorry, Your Honor. I was saying  
5 that I don't know the legal definition of "harm," and so it's  
6 very hard for me to point to a specific harm, but I can say  
7 that Cargill's presence in the market is affecting our  
8 ability to move forward with Aquaterra.

9 MR. CONNALLY: Your Honor, I'd like to play  
10 Page 261, lines 23 to 26.

11 The computer is frozen. Again, I'll do it the  
12 old-fashioned way.

13 THE COURT: 261?

14 MR. CONNALLY: Yes, Your Honor, line 23.

15 (There was a pause in the proceedings.)

16 MR. CONNALLY: I'm sorry, Your Honor.

17 THE COURT: 261?

18 MR. CONNALLY: 261, yes, line 23.

19 THE COURT: All right.

20 BY MR. CONNALLY:

21 Q. Are you there, Ms. Boettner?

22 A. Which lines?

23 Q. 261, starting on line 23.

24 A. Okay. Yes.

25 Q. Question by Mr. Dillon: "Do you believe BASF and Cargill

Boettner, B. - Redirect

1 have harmed Nuseed in any way?

2 "Answer: I can't answer your question."

3 That was your testimony, correct?

4 A. That's correct. As I explained, I don't know the legal  
5 definition of "harm."

6 MR. CONNALLY: Pass the witness, Your Honor.

7 MR. SUNG: May I proceed?

8 REDIRECT EXAMINATION

9 BY MR. SUNG:

10 Q. Just one question as a follow-up, Ms. Boettner. And,  
11 sorry, I don't have a video with this one, but --

12 A. Thank goodness.

13 Q. -- with respect to your cross-examination testimony with  
14 Mr. Connally just a moment ago, he had referred to the fish  
15 feed trials that we talked about earlier. Do you recall  
16 that?

17 A. Yes.

18 Q. And with regard to those fish feed trials, do you have  
19 any understanding as to what happened to all those fish?

20 A. Yes. So those trials have all completed now, and so the  
21 fish were harvested. They were taken out of the pens and  
22 sent to a processing plant and sent into the market. I'm  
23 guessing that quite a few of them made their way to the U.S.  
24 market, since Chile --

25 THE COURT: You're guessing. Don't tell us what

1     you're guessing.

2             THE WITNESS:   Okay, yes, Your Honor.

3             So I'm -- the fish --

4             MR. CONNALLY:   Your Honor, foundation.   I object for  
5     lack of foundation.   I don't think foundation has been laid  
6     here.

7             THE COURT:    Maybe you better start over, Counsel.

8     BY MR. SUNG:

9     Q.   Well, again --

10            MR. SUNG:   No further questions for the witness,  
11   Your Honor.

12            THE COURT:   All right.

13            MR. CONNALLY:   Nothing further, Your Honor.

14            THE COURT:   All right.   May this witness be excused?

15            MR. SUNG:   Yes, Your Honor.

16            MR. CONNALLY:   Yes, Your Honor.

17            THE COURT:   All right, Ms. Boettner.   You may be  
18   excused as a witness, and since you're excused, you may  
19   remain in the courtroom, but you may not discuss your  
20   testimony with any other witness in the case until the case  
21   is concluded.

22            THE WITNESS:   Okay.

23            (The witness was excused.)

24            THE COURT:   All right.

25            MR. SUNG:   Your Honor, the proponents would like to

—Jarosz, J. - Direct—

1 call Mr. John Jarosz to the stand.

2 (The clerk administered the oath.)

3 THE COURT: All right. You may proceed.

4 MR. SUNG: Thank you, Your Honor.

5 JOHN JAROSZ, called by Nuseed, having been first  
6 duly sworn, was examined and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. SUNG:

9 Q. Mr. Jarosz, would you please state your name for the  
10 record.

11 A. My name is John C. Jarosz.

12 Q. And what is your profession?

13 A. I'm an economist.

14 Q. Generally, what does an economist do?

15 A. We do lots of things, but among the things that I do in  
16 the work that I do in economics is value assets, evaluate  
17 marketplaces, and study the behavior of producers and  
18 consumers.

19 Q. And do you specialize in any particular area of  
20 economics?

21 A. Most of my work is in the economics of intellectual  
22 property protection, and most of my work in that area is  
23 assessing damages in patent infringement cases.

24 Q. And if we can bring up a slide here for you.

25 Can you tell us what's on this slide?

—Jarosz, J. - Direct—

1 A. Yes. This is a summary of my qualifications. At the  
2 very top, it shows my education. I have a Bachelor's in  
3 economics from Creighton University, which is in Omaha,  
4 Nebraska. I have a law degree from the University of  
5 Wisconsin. And I was a fellowship student in the Ph.D.  
6 program in economics at Washington University in St. Louis.  
7 There I completed most of the requirements for a Ph.D. but  
8 not all of them and was ultimately awarded a Master's in  
9 economics.

10 I have been in this profession for about 34 years,  
11 and along the way, I've been actively involved in a number of  
12 professional associations that are shown on the screen. The  
13 Sedona Conference is the one I've been most active in  
14 recently, and that is a group of judges, economists, and  
15 lawyers who get together to try to move the law forward in an  
16 effective way. And what I'm involved with is the group that  
17 helps with the presentation of patent damages to juries in  
18 infringement settings.

19 I also regularly research and publish articles in a  
20 variety of professional and practitioner journals. I  
21 regularly give speeches and teach classes. Among the places  
22 I teach are the United States Patent and Trademark Office,  
23 the Georgetown Law School, the George Washington Law School,  
24 the University of Pennsylvania Economics Department and Law  
25 School, and the Columbia Business School.

—Jarosz, J. - Direct—

1           And, finally, for a number of years, I was the  
2 editor of a treatise, a book on licensing, and that's what is  
3 shown on the bottom.

4           MR. SUNG: If we can bring up the next slide,  
5 please.

6 BY MR. SUNG:

7 Q. Can you tell us what this slide represents?

8 A. One of the things that I do is provide testimony in  
9 trials like this, and I have provided arbitration or trial  
10 testimony almost 100 times across the country in a variety of  
11 different settings, and this is just a map of the places in  
12 which I've provided trial or arbitration testimony.

13 Q. Where do you work now?

14 A. I work at Analysis Group, Incorporated.

15 Q. Can you tell us what Analysis Group, Incorporated does?

16 A. We're an economic, financial, healthcare, and strategy  
17 consulting firm. We have about 1,000 people. Many of us are  
18 in the United States. We have offices throughout the  
19 United States, but we also have offices overseas. I think  
20 today it's four or five different offices overseas. I am the  
21 founder of the firm's Washington, D.C. office, and I have  
22 been director of that office ever since I founded it, though  
23 I currently live in Virginia and have for the last 34 years.

24 Q. And how long have you been employed by the Analysis  
25 Group?

—Jarosz, J. - Direct—

1 A. Since March of 1996. So that's a little over 23 years at  
2 Analysis Group.

3 Q. And prior to that?

4 A. I was at another economic consulting firm that did  
5 similar kind of work, and I was at that firm for about ten  
6 years.

7 Q. And with respect to the testimony that you've provided in  
8 the past on behalf of, let's say, plaintiffs and defendants,  
9 about how much have you offered testimony for one versus the  
10 other?

11 A. In the patent infringement field, about half the time I'm  
12 working and representing the owner of patent rights, and  
13 about half the time I'm working with and representing the  
14 parties that have been accused of infringement. So my work  
15 is about 50/50; sometimes for the owner of the patents,  
16 sometimes for the infringer or alleged infringer of the  
17 patents.

18 MR. SUNG: Your Honor, we offer Mr. Jarosz as an  
19 expert in the fields of intellectual property valuation and  
20 the analysis of damages arising from the alleged infringement  
21 of intellectual property.

22 MS. SHAW: No objection, Your Honor.

23 THE COURT: All right. You may proceed.

24 MR. SUNG: Thank you, Your Honor.

25 BY MR. SUNG:



—Jarosz, J. - Direct—

1 Q. Mr. Jarosz, what have you been asked to do in this case?

2 A. I was asked to do two things: For current purposes, the  
3 first thing, which is relevant today, is evaluate the damages  
4 that should be paid since the jury has found that patent  
5 rights have been infringed by BASF and Cargill's activities,  
6 so how much money should be paid them.

7 Q. And what is your understanding of the patented  
8 technology?

9 A. I generally understand that it allows for the  
10 synthesization or the creation of omega-3 fatty acids in  
11 canola seeds. So it's generally -- I think I'll use the term  
12 today -- a plant-based or canola-based omega-3.

13 I understand that the technology is used in two sets  
14 of projects. The first, on the left, is CSIRO, GRDC, and  
15 Nuseed's project and ultimate product called Aquaterra. On  
16 the right, it's the BASF/Cargill project, which will  
17 hopefully ultimately become a product, called Latitude. Both  
18 of those are oriented to aquaculture that is used in fish  
19 feed.

20 Q. And have you reviewed any materials with respect to what  
21 has taken place here, either before or during trial?

22 A. Yes, I reviewed quite a number of documents that were  
23 produced by all the parties in this case; I read quite a bit  
24 of deposition testimony; expert reports that have been filed  
25 by a variety of individuals in this case; and I also read the

—Jarosz, J. - Direct—

1 trial testimony that has occurred so far.

2 Q. And are you aware that Mr. Zacharias and Ms. Boettner  
3 have testified that Nuseed has not yet sold Aquaterra?

4 A. Yes, I'm aware of that.

5 Q. So you're aware that Cargill's witnesses have also  
6 testified that Cargill has not sold Latitude?

7 A. Yes, I'm aware of that.

8 Q. And do you have an understanding as to whether there have  
9 been any pre-sales activity?

10 A. Yes. With this product line for both companies, as is  
11 true with any product line for any company, there are a  
12 substantial number of pre-sale activities, things like  
13 research and development and testing. Here, there's been  
14 work having to do with research and sampling with potential  
15 clients or customers and regulatory approval activities.

16 So there's been quite a bit that was done, as is  
17 necessary in any setting of rolling out products before the  
18 first product is sold in the marketplace.

19 Q. So are activities undertaken before actual sales  
20 important to the commercialization process?

21 A. Yes, they're extremely important. In fact, in some  
22 regards, they're the most important activities, because the  
23 companies are seeking to determine whether the product can  
24 and will succeed, so they're undertaking research activities  
25 and necessary regulatory approvals and product testing.

—Jarosz, J. - Direct—

1           So once those hurdles are passed, then the product  
2       is ready for commercial roll-out or first sales. So that  
3       early activity is essential for later selling activities.

4       Q.   Okay.

5           THE COURT: Mr. Sung, can you get the mic a little  
6       closer?

7           MR. SUNG: Will do, sir.

8           THE COURT: Thank you.

9       BY MR. SUNG:

10      Q.   So if we can bring up the next slide, please. Before  
11      we --

12           MS. SHAW: Objection. Your Honor, could we have a  
13      sidebar and take that slide down?

14           THE COURT: All right.

15           (The following was heard at the sidebar:)

16           MS. SHAW: Your Honor, this slide provides a royalty  
17      rate that is based entirely on future projections.

18           THE COURT: I'm sorry. I can't hear you.

19           MS. SHAW: I'm sorry. This slide that he's putting  
20      up, this royalty right here is based entirely on future  
21      projections of sales, costs, and profits by Nuseed, as well  
22      as BASF and Cargill, and also based on what their future lost  
23      profits might be. There is no basis for this reasonable  
24      royalty outside of future projections.

25           Further, this reasonable royalty base is calculated

—Jarosz, J. - Direct—

1 using a future selling price for the Aquaterra oil, and that  
2 is the only way they arrive at this past damages amount. It  
3 is based entirely on future projection, and, as I understand  
4 from Your Honor, you did not want to allow evidence in that  
5 was related to future sales and projections, and I object to  
6 this on those grounds.

7 MR. SUNG: And, Your Honor, the numbers that  
8 Ms. Shaw is referring to are the product of the hypothetical  
9 negotiation that our expert will describe.

10 MS. SHAW: If you look at the size -- they're going  
11 to put this revenue number up in front of the jury; this is  
12 Cargill's future projections. They're going to put this  
13 number up before the jury; this is Nuseed's. This is how  
14 they're calculating their royalty rate, using future  
15 projections, future costs, future expected royalties. None  
16 of this is based on past activity.

17 MR. SUNG: Your Honor, it would be our position  
18 that, as part of the hypothetical negotiation, the expert may  
19 rely upon information about projected sales as a proxy for  
20 what would have been agreed upon as a reasonable royalty rate  
21 in the hypothetical negotiation.

22 MS. SHAW: And that would only apply to sales, and  
23 there have been no sales here. Importantly, all the past  
24 damages relates to is product that has not been sold.  
25 They're trying to apply a number that they've calculated that

—Jarosz, J. - Direct—

1 has no relationship to the activity that has happened in the  
2 past to set a rate.

3 THE COURT: I don't believe that there has been any  
4 foundation to base damages that they've incurred to date on  
5 future projections. There just isn't any evidence to support  
6 that as a foundation. I mean, when somebody comes up with a  
7 50 percent royalty, I mean, that is just so far off the  
8 charts, it's just absurd to think that the Court would use  
9 that for any kind of guidance. 12 percent is bad enough, but  
10 49 percent is laughable.

11 There's just no foundation for projecting sales when  
12 the party doesn't even know when the sales will begin, and  
13 we're talking about damages that have been incurred up until  
14 today.

15 Now, it may be possible to tell the projected  
16 damages when we're talking about future damages, but not when  
17 we're talking about past damages.

18 MR. SUNG: There's a valuation that does bear a  
19 relationship to the activity that they've already undertaken.  
20 Unless Your Honor is saying that there is a valueless  
21 activity, I think that the jury should be able to hear, based  
22 on the hypothetical negotiation, what the parties would have  
23 agreed to on this issue.

24 THE COURT: I don't think that there's any  
25 foundation for the hypothetical negotiation that you project.

—Jarosz, J. - Direct—

1 There may be a hypothetical negotiation that would take place  
2 now that the patents have been decided, but I don't think  
3 that there's any hypothetical negotiations based on these  
4 projections that would tell us what the past damages are.

5 And I'm not saying that you don't have any past  
6 damages. What I'm saying is I don't think that there's any  
7 foundation to base past damages upon these projections in the  
8 uncertain world that we are at this point, which is neither  
9 side knows even when they're going to begin sales; mostly  
10 your sales. I mean, you know, your witness said one thing  
11 two months ago and a different thing now. And, granted, she  
12 may have learned something between the deposition and today  
13 in some areas, but, you know, she said two months ago she  
14 didn't have any idea when they were going to start selling  
15 the product, and now she says she hopes to start selling it  
16 in six months. That's the hope. I haven't heard any  
17 evidence that would support that hope.

18 So I don't think you can use this as the basis for  
19 damages incurred up until now. They've spent money on  
20 research in the hopes that they will eventually commercialize  
21 the product, but we haven't heard anything about that. You  
22 can't start out with those numbers. You have to lay a  
23 foundation for those numbers. It's just like your first  
24 witness said this is a billion-dollar business. There was no  
25 basis for that testimony. He just pulled it out of the air.

—Jarosz, J. - Direct—

1 There's no foundation for this.

2 MR. SUNG: Well, what I would say, Your Honor, is  
3 that, unlike a completely untested new product, both products  
4 are admittedly directed to replacing natural fish oil, and we  
5 do have evidence of what the natural fish oil price is that  
6 both companies are benchmarking to. So there's a valuation  
7 basis for all of this. Whether it applies --

8 THE COURT: Well, if there is, I haven't heard it.

9 MR. SUNG: Well, Ms. Boettner did testify that the  
10 current fish oil price is \$1,900, and we will bring out,  
11 through both Mr. Jarosz as well as our cross of Dr. --

12 THE COURT: That number standing alone has no  
13 meaning, absolutely none. That's the only number she said.  
14 They haven't costed out how much it's going to cost to  
15 produce the product. They haven't costed out what they're  
16 going to sell it for. So you can't start with those figures.  
17 Whether you get to those figures -- I think it's going to be  
18 difficult to get to them at this phase of the trial, but you  
19 haven't gotten to them yet, and you can't start out with  
20 those numbers and work backwards.

21 MR. SUNG: Understood.

22 THE COURT: You have to lay a foundation for them.

23 MR. SUNG: We would do that with Mr. Jarosz, and so  
24 we would agree to withdraw that slide --

25 THE COURT: Well, you'll attempt to do that with

—Jarosz, J. - Direct—

1 him, and we'll see if you do.

2 MR. SUNG: Understood. Yes, sir.

3 THE COURT: But you haven't done it yet.

4 MS. SHAW: And I can make objections at the  
5 appropriate time -- I plan on objecting at the appropriate  
6 time because in Mr. Jarosz's report, he has not provided any  
7 basis for valuing any oil unless it was sold, including the  
8 fish oil price.

9 THE COURT: Well, I'll have to deal with -- I can't  
10 project what is going to happen in the future, but you can't  
11 start out throwing those numbers at the jury. There's no  
12 foundation for it.

13 MR. SUNG: Understood.

14 (The following was heard in open court:)

15 THE COURT: Ladies and gentlemen, that chart flashed  
16 momentarily on the screen. You should pay no attention to  
17 that. Such a graph can't be put on the screen until first  
18 it's admitted, which it hasn't been. So whatever you saw on  
19 the screen, you'll have to put out of your mind. I don't  
20 know if you saw it or not. It was not up there very long,  
21 but at this point, there's no basis for it being up there.

22 All right. You may proceed.

23 MR. SUNG: Thank you, Your Honor.

24 BY MR. SUNG:

25 Q. Mr. Jarosz, can you tell us from your calculations, as a



—Jarosz, J. - Direct—

1 summary, of what you have found the reasonable royalty  
2 damages to be in this case?

3 THE COURT: That's what I just said he hadn't laid a  
4 foundation for, Counsel.

5 MR. SUNG: I understand, Your Honor.

6 BY MR. SUNG:

7 Q. Mr. Jarosz, have you seen evidence that estimates  
8 Cargill's anticipated production in the future?

9 A. Yes, I have.

10 MS. SHAW: Objection, Your Honor. This is unrelated  
11 to past damages.

12 THE COURT: Let me see counsel again.

13 (The following was heard at the sidebar:)

14 THE COURT: I don't know what you're thinking. You  
15 just started out by asking him what was on the chart after I  
16 said that there was no foundation.

17 MR. SUNG: I'm sorry, Your Honor. I thought you  
18 were referring to the percent royalties on that chart.

19 THE COURT: We're talking about past damages. The  
20 only evidence he has that has any relevance to any kind of  
21 damages is this witness's statement of how much fish oil  
22 costs today.

23 MR. SUNG: Yes, sir.

24 THE COURT: Okay. Well, that isn't really helping  
25 us, because what we're talking about are past damages.

—Jarosz, J. - Direct—

1 MR. SUNG: Yes, sir.

2 THE COURT: We need to know some calculation of how  
3 much it's going to cost to produce the product, how much the  
4 product costs, whether it justifies the investment they've  
5 made. I mean, as I said before we even started this, I  
6 didn't know how in the world you were going to prove any past  
7 damages because if he established a reasonable royalty, which  
8 is not going to be 50 percent, what would you apply it to?

9 MR. SUNG: And so I'm not trying to be enigmatic  
10 about this, Your Honor.

11 THE COURT: Well, I don't think you're being  
12 enigmatic. You're facing a difficult task. As I said, I  
13 don't know how you prove past damages when neither side has  
14 any sales. We don't know how much to expect the sale price  
15 to be. How much are fish farmers going to pay extra so that  
16 their fish would have more omega-3 fatty acid?

17 MS. SHAW: Your Honor, I would just note that the  
18 past production of oil, none of that was provided, as I  
19 understand it, to fish farmers. So to the extent fish  
20 farmers are paying whatever Mr. Sung concedes that -- thinks  
21 that they're paying, that number is not relevant to the  
22 purposes of the oil that was made in the past if it was used  
23 for an entirely different intended purpose.

24 MR. SUNG: And our position has been, all along,  
25 that the projections of both companies as to what the sales

—Jarosz, J. - Direct—

1 would be going forward can help inform, as a proxy, the  
2 amount of oil that has already been produced by Cargill. We  
3 would apply that same metric.

4 MS. SHAW: There's no basis for that in Mr. Jarosz's  
5 report. There's no basis for valuing the oil that is the --

6 THE COURT: Well, I don't know how many plants it  
7 takes to produce a given amount of oil, and so how can we  
8 apply a royalty to a given amount of plants when we don't  
9 know -- there's no history of price of the oil, and we don't  
10 know how many plants it takes to produce the oil.

11 MR. SUNG: There would be testimony on that, Your  
12 Honor, in terms of how much.

13 THE COURT: Well, there isn't yet.

14 MR. SUNG: Correct.

15 THE COURT: Well, you're going to the wrong starting  
16 point.

17 MR. SUNG: Okay. I'm happy to start there.

18 MS. SHAW: Your Honor, Benita Boettner was a fact  
19 witness for the past damages case. Mr. Jarosz has no basis  
20 or foundation to provide testimony on these things.

21 MR. SUNG: This would be from Cargill's own  
22 documents.

23 MS. SHAW: Mr. Jarosz is not in a position to lay  
24 the foundation for Cargill's own documents which have not  
25 been admitted and for which no testimony has been provided.

—Jarosz, J. - Direct—

1 THE COURT: Well, I don't know -- I don't know how  
2 much -- I mean, it seems to me the starting point is how much  
3 does it cost to produce a given amount of canola oil, and how  
4 can you estimate what the price is going to be without  
5 knowing what it cost to produce it and what you're going to  
6 sell it for?

7 MR. SUNG: That's why both companies' projections  
8 are the best metric of that, in our opinion.

9 MS. SHAW: Your Honor, I would just note that the  
10 past damages amount is not for oil that was made to sell into  
11 the market, it was oil that was made for R&D purposes. So to  
12 use valuations of oil for commercial sales, it bears no  
13 relationship to the value when used for R&D, and it is  
14 clear --

15 THE COURT: Well, I think it does bear some  
16 relationship --

17 MS. SHAW: Okay. Well, there's no basis. There's  
18 no opinion laid in Mr. Jarosz's expert report for valuing the  
19 oil for R&D purposes. He relies solely on the future  
20 commercial value --

21 THE COURT: Well, I haven't heard what he relies on.  
22 I don't know what he relies on, but you have to start with  
23 how much it cost to produce the oil and how much went into  
24 research. Of course, they spent a lot more money than you  
25 did. How much did it cost you to research it, how many

—Jarosz, J. - Direct—

1 plants does it take to produce a given amount of oil, how  
2 much does it cost, how much do you have to pay the farmers to  
3 do that. I mean, you have to have a foundation. You don't  
4 have anything.

5 MR. SUNG: Yes. I was about to introduce an  
6 exhibit, Your Honor, of Cargill's projections, but those  
7 projections start from 2016, so they are historical.

8 THE COURT: Projections for what?

9 MR. SUNG: For the expected production, the expected  
10 price of the oil. And, again, all of the data --

11 MS. SHAW: These numbers are for 2020. I don't know  
12 which document you're referring to, but these documents are  
13 for the future.

14 MR. SUNG: Sorry. I don't have my glasses. And  
15 then with Nuseed as well --

16 THE COURT: Do you have any --

17 MR. SUNG: -- ones that are projections --

18 THE COURT: Do you have any projections from your  
19 client --

20 MR. SUNG: We do.

21 THE COURT: -- as to how much they spent?

22 MR. SUNG: We do.

23 THE COURT: Well, that's the starting point.

24 MS. SHAW: Those are future projections, Your Honor.  
25 They're projections for future costs that have not happened.

—Jarosz, J. - Direct—

1 THE COURT: Well, they've spent money raising them.  
2 That's what is -- that's what they've done in the past.  
3 They've spent money raising them. That's the number that we  
4 ought to have, how much it cost them to raise the product,  
5 how much oil was produced for what costs in the past.

6 MS. SHAW: And, Your Honor, Mr. Jarosz does not rely  
7 on that in calculating --

8 THE COURT: Well, if he didn't rely on that, we'll  
9 deal with that when we get to it.

10 MS. SHAW: Yes, Your Honor.

11 MR. SUNG: May we ask to possibly consider a lunch  
12 break to allow us to really narrow this down? I think it  
13 will be a lot more effective. Because we want to take and  
14 heed what you just said in terms of making sure that we can  
15 direct this to those foundational elements for you.

16 THE COURT: All right. We'll take a lunch break  
17 now.

18 (The following was heard in open court:)

19 THE COURT: Ladies and gentlemen, the parties --  
20 well, I think we should ask the witness to step down and  
21 remain outside the courtroom until he's recalled.

22 MS. SHAW: Your Honor, would you please give the  
23 witness the same instruction you've given other witnesses?

24 THE COURT: You should not discuss your testimony  
25 with anyone between now and the time that you return to the

—Jarosz, J. - Direct—

1 stand, or consult any documents. You should return to the  
2 stand exactly as you leave it now.

3 THE WITNESS: Yes, sir.

4 (The witness exited the courtroom.)

5 THE COURT: All right.

6 Ladies and gentlemen, it's going to take a little  
7 while to straighten out the wrinkles that are caused when we  
8 have a dual system of determining damages. Part of them are  
9 determined by you, and part of them are determined by me, and  
10 it's difficult to draw the line exactly where one starts and  
11 the other begins, and that's what we're trying to figure out  
12 now.

13 So let's take a recess, and you can have a leisurely  
14 lunch and return at 2:00.

15 (The jury exited the courtroom.)

16 THE COURT: Counsel, the projections that you make  
17 on what is a reasonable royalty are so astonishing that the  
18 Court, even if it was inclined to let you start at the end  
19 and work back to the beginning, can't do that in this case.  
20 I mean, you've got the royalty going up to 49 percent, which  
21 is unheard of. I've never heard of such a royalty.

22 So you're going to have to have a foundation before  
23 you put any numbers in front of the jury. And, as I said,  
24 what matters to past damages is what happened in the past,  
25 not what is projected in the future, and before you can start

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1 projecting in the future, you have to know how much it cost  
2 to produce the oil. And you've produced it, and they've  
3 produced it, and that's where you have to start; how much did  
4 it cost to produce it?

5 The research money is what an economist, I guess,  
6 would call a sunk cost. That's been spent. It can't be  
7 recaptured. I mean, you try to recapture it through sales  
8 over time, but -- I guess your sunk costs are relevant to how  
9 much you have invested in the project, but we have to know  
10 what it cost to produce it and what damage has been caused to  
11 you by their infringement to date, not what may be caused by  
12 their infringement at some time in the future.

13 And, as I said earlier, I was really wondering how  
14 you were going to prove any past damages, and it's proving  
15 very difficult for you to do so, which I expected it would.  
16 When you've got no sales of the product on either side, you  
17 don't even have a projected cost of the product. You don't  
18 have a cost of producing the product. How can you come to  
19 any realistic estimate of past damages?

20 So if your expert is basing things entirely on  
21 projections of future sales, I don't think that is going to  
22 be an effective determinant of what you are entitled to in  
23 past damages. It may be relevant, if he can support it, to  
24 potential future damages, but past damages -- what are they?  
25 How much does their alleged infringement affect your research



—Jarosz, J. - Direct—

1 costs?

2           When did the infringement start? Nobody said when  
3 the infringement started. Did it start when they first  
4 planted the product which produced allegedly infringing oil?  
5 I don't know. Did it start when you first notified them that  
6 you were claiming they were infringing? I don't know. But  
7 you have to lay your foundation before you hit the jury with  
8 any percentage royalty that you're requesting.

9           So I don't know how you do that. I just named some  
10 examples of what I think is missing, but I don't know if I've  
11 thought of all the examples of what's missing or not. It's  
12 just that everything is missing at this point.

13           MR. SUNG: And, Your Honor, we greatly appreciate  
14 your guidance on that, and so based on --

15           THE COURT: Well, I'm not supposed to be -- I'm not  
16 supposed to be determining what evidence you should present.  
17 You have to decide what evidence you want to present or  
18 attempt to present, but I've told you that I don't see how  
19 you can support these numbers without some foundation, and  
20 I've given you some ideas of what I meant by foundation, but  
21 you've got to put it together however you think it ought to  
22 be put together.

23           MR. SUNG: And, Your Honor, just a question about  
24 order of presentation. For purposes of the presentation,  
25 would it be your decision to keep the jury here on an

—Jarosz, J. - Direct—

1 advisory basis on future damages, as well?

2 THE COURT: Absolutely not. They make a decision,  
3 and I'm not going to have them give an advisory verdict on  
4 future damages.

5 MR. SUNG: Understood.

6 THE COURT: They'll make their decision, and then  
7 they'll be excused, and then we can start working on future  
8 damages when they start deliberating.

9 MR. SUNG: Thank you.

10 THE COURT: All right. We'll be in recess until  
11 2:00.

12 (Recess from 12:44 p.m. to 2:02 p.m.)

13 MR. SUNG: Your Honor, if we may, the proponents  
14 would like to address the Court in the form of a proffer.

15 The proponents are not seeking to prove past damages  
16 in this case based on the direct economic injury from the  
17 infringing conduct. Rather, what we would intend to prove is  
18 that, based on a royalty base multiplied by a royalty rate,  
19 that there could be indeed past damages. The royalty base  
20 would be based on evidence we would intend to introduce that  
21 talks about the amount of infringing oil that Cargill has  
22 produced to date.

23 In addition, the royalty rate would be based on  
24 expert testimony with regard to the parties' individual  
25 licenses but also based on projected information or data with

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1 regard to future projections by both parties. If it's Your  
2 Honor's determination that the reliance on these future  
3 projections is unacceptable to present to the jury or that  
4 any jury verdict that relied on that would otherwise not be  
5 informative to the Court for future ongoing royalties, then  
6 we would submit that we can dismiss the jury from further  
7 proceedings and head directly to a discussion about  
8 injunctive relief and any ongoing royalties.

9 Part of the proffer would include submitting to the  
10 Court for evidence the expert report of John Jarosz from  
11 June 21, 2019, as well as Mr. Jarosz's supplemental expert  
12 opinion from August 28 of 2019, and then, lastly,  
13 Exhibit CX-0364.

14 THE COURT: Well, there are problems with attempting  
15 to base a reasonable royalty rate based on projected future  
16 sales, and at this point, as the evidence stands, I don't  
17 believe the Court can do that.

18 One thing that happened is that the -- a couple of  
19 the patents were found not to be infringed. Mr. Jarosz's  
20 report did not apportion the damages between the patents. He  
21 seemed to be trying to say that the damages from any one  
22 patent would support the entire damages claim, which I don't  
23 believe is in accordance with the law on determining damages.

24 Furthermore, there's no evidence before the Court as  
25 to when the proponents will get their product to market. As

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1 I said, the only evidence is the testimony of Ms. Boettner,  
2 if I'm saying their name correctly, that she hopes it will be  
3 ready in six months, which is different than her testimony  
4 was in her deposition, but time has passed since her  
5 deposition, and I can't determine the difference, what  
6 difference, if any, that that made.

7 So I don't believe that there's any way that  
8 Dr. Jarosz can base his projection of past damages. I  
9 understand that what he's going to base it on is the value of  
10 the seeds produced in the experimental basis, which that part  
11 of it makes sense. And even if you applied the maximum  
12 range, he didn't pick any range. He said between 12 and 49  
13 percent, which is not helpful to the Court in the least.  
14 I've never heard of a 49 percent range, nor can I imagine any  
15 economic basis for same. How can somebody manufacture a  
16 product and give away 49 percent in a royalty? I've never  
17 seen it. I've never seen anybody even argue that that's what  
18 it should be.

19 So based on the testimony in the record thus far, I  
20 would say that his range would not be helpful to the Court in  
21 projecting what the future damages should be or whether an  
22 injunction should hold.

23 I've got to know whether the patents which are found  
24 to be invalid would be sufficient for, for example, for the  
25 opponents to produce Latitude. In other words, can they

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1 produce it without infringing on any of the Group A patents?  
2 If they can, then it's questionable whether it would be  
3 possible to determine any royalty.

4 But the patents that have been infringed seem, to  
5 the Court, at this stage of the proceeding -- and I haven't  
6 heard from the defendant yet -- but seem to be a proper basis  
7 for an injunction. But I don't know how you would determine  
8 a royalty rate based on the evidence that's before me at this  
9 time.

10 MR. SUNG: And the only thing I would add, Your  
11 Honor, is that, of course, we respectfully disagree with  
12 regard to the apportionment law application in this case. It  
13 is Dr. Kunst's testimony earlier that each of the Group A  
14 patents, at the very least, would command the full value of  
15 that technology based on infringement, and I believe  
16 Mr. Jarosz --

17 THE COURT: Well, all of the Group A patents, I  
18 think, with maybe one exception -- were there four or five  
19 Group A patents?

20 MR. SUNG: Four, Your Honor.

21 THE COURT: Well, all four of them were found to be  
22 infringed.

23 MR. SUNG: Yes.

24 THE COURT: So that your position is that any one of  
25 them would preclude the Latitude product, but I don't know

—Jarosz, J. - Direct—

1 that yet. And that's just speculation for the Court to try  
2 to decide that issue.

3 MR. SUNG: Well, we believed, again, that Dr. Kunst  
4 did testify to that effect during the liability phase of  
5 trial.

6 THE COURT: Well, I don't know that her testimony  
7 was accepted or not. There was testimony to the contrary,  
8 and if the Court has to decide that question, I would have to  
9 compare her testimony and the other testimony in the case to  
10 see if those four patents would bar Latitude entirely or not,  
11 or how difficult would it be for Cargill and BASF to design  
12 around those four patents?

13 MR. SUNG: Understood, Your Honor.

14 THE COURT: But it seems to the Court, based on the  
15 evidence at this time, that you'd be entitled to an  
16 injunction on those four patents. But there are just too  
17 many holes in the economist's testimony; the range, the fact  
18 that he didn't apportion them. Even in view of that  
19 testimony, the fact that he's only applying the range to that  
20 one group of products that was worth, what, around \$3,000?

21 But, of course, that -- I mean, you want that big  
22 number so you can apply it to the ongoing royalty. It  
23 doesn't help you -- it's worth a few hundred dollars on past  
24 damages. But I can tell you that as far as an ongoing  
25 royalty is concerned, the Court would not accept that range

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1 as advisory.

2 MR. SUNG: Understood, Your Honor. I think that  
3 you've seized upon the various factors relating to the  
4 uncertainties in this case in advance of the commercial sales  
5 that you've talked about, and we would agree with you from  
6 the proponents' standpoint that injunctive relief would be  
7 warranted on those bases, and so I think based on what you've  
8 articulated just now, again, we would submit that the jury  
9 could be dismissed at this point in time.

10 THE COURT: Do the opponents have anything to say  
11 about that?

12 MS. SHAW: Your Honor, we have no objection to  
13 dismissing the jury. As I understand it, proponents of the  
14 patents are now withdrawing their past damages claim, if I  
15 heard it correctly.

16 I did want to comment on the point about the  
17 injunction. We do believe that there is evidence to be put  
18 on and expert testimony to be put on on the appropriateness  
19 of both, any future royalty and an injunction, which as I'm  
20 sure this Court knows, post *eBay*, there's a number of factors  
21 and considerations to take into account for that.

22 THE COURT: I know that there are a number of  
23 factors to take into consideration. That's why I said that  
24 it appeared to the Court that at this point, that it was the  
25 most probable, but I'm not -- I don't want to guarantee to

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1 the proponents that I'm going to grant them an injunction. I  
2 don't want that to be the basis for your dismissing the jury.

3 But I think you have a -- what can I say? I mean, I  
4 think you certainly have a prima facie case to get an  
5 injunction, and it's up to the opponents to persuade the  
6 Court that that would not be an appropriate remedy. I think  
7 prima facie it would be, but I don't want that to be the  
8 reason for you to dismiss the jury.

9 MR. SUNG: Thank you, Your Honor. We understand.

10 THE COURT: All right. Well, do you want to dismiss  
11 the jury?

12 MR. SUNG: Yes. That would be our proffer.

13 THE COURT: All right. Bring the jury in.

14 (The jury entered the courtroom.)

15 THE COURT: Well, ladies and gentlemen, as I  
16 mentioned to you before the break, it appears that all  
17 aspects of this case are very complex, including the damages,  
18 and it's very difficult to draw a line between the damages  
19 that occurred in the past and those which may occur in the  
20 future.

21 The part of the case that applies to you is only the  
22 past damages, and using the evidence that the plaintiff is  
23 prepared to present, it does not appear that the past damages  
24 would be of any great significance. So the parties have  
25 agreed that they are going to focus on the future damages and



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1 not the past damages, which means that you don't have a  
2 decision to make, and you're going to be excused as jurors.

3 Again, if you would wait just a minute in the jury  
4 room, I'll come in there and thank you again for your  
5 service.

6 (The jury was excused from the proceedings.)

7 THE COURT: Give me just a minute or two.

8 (There was a pause in the proceedings.)

9 THE COURT: Well, the jury wanted me to say that  
10 they thought the attorneys on both sides did an excellent  
11 job, and they thought they were very professional in the way  
12 they presented their case, and very well prepared and  
13 knowledgeable about your respective presentations. They  
14 wanted to be sure that I said that to you, and I will say I  
15 agree with them. So they have been excused now, and we can  
16 proceed with the other aspect of damages.

17 MR. SUNG: Thank you, Your Honor. I think just as a  
18 housekeeping issue, we wanted to make sure it was clear on  
19 the record that Your Honor did accept the proffer of  
20 proponents?

21 THE COURT: Did accept what?

22 MR. SUNG: The proffer of proponents that,  
23 essentially, the basis for our dismissal or request to  
24 dismiss the jury was the insufficiency of the evidence from  
25 Your Honor's perspective of the evidence that we would

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1 otherwise have submitted with respect to the royalty rate.

2 THE COURT: Yeah. Well, basically, the Court felt  
3 that no foundation had been established for the royalty rates  
4 set forth in the doctor's report, and I felt that the range  
5 was too wide to be of any help, and the application of that  
6 range of rates to past damages would not be persuasive to the  
7 Court in setting royalties.

8 I've just never heard of a license agreement that  
9 had royalties in that range, particularly the upper end of  
10 the range, and I can't imagine the results of a hypothetical  
11 negotiation being a royalty range of 49 percent.

12 All right.

13 MR. SUNG: So, Your Honor, we'll go ahead and bring  
14 Mr. Jarosz back to the stand to continue his testimony, now  
15 focusing on the injunctive relief aspects.

16 THE COURT: All right.

17 (The witness resumed the witness stand.)

18 THE COURT: All right. You may proceed.

19 MR. SUNG: Thank you, Your Honor.

20 BY MR. SUNG:

21 Q. Mr. Jarosz, you'll notice that we're a little fewer in  
22 number this afternoon.

23 A. Yes.

24 Q. But what I'd like to do is to take you through your  
25 analysis and your expert opinion with regard to the

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1 injunctive relief aspect, and so let me ask:

2 In coming to your opinion on whether injunctive  
3 relief is appropriate in this case, what factors did you  
4 consider?

5 A. I considered three factors; irreparable harm, balance of  
6 hardships, and public interest.

7 Q. And can you explain what irreparable harm means in this  
8 context?

9 A. As I understand it, it means harm for which there will  
10 not be full compensation due to the facts and circumstances  
11 of the situation at hand, in other words, harm that is  
12 extremely difficult to measure completely.

13 Q. And what types of harm did you consider that Nuseed may  
14 suffer here?

15 A. I think there are three forms of harm if BASF and Cargill  
16 remain in the marketplace: Number one is profit erosion;  
17 number two is impact on research and development activities;  
18 and number three is the impact on customer relationships.

19 Q. And in your opinion, would these harms be irreparable?

20 A. Based on the facts and circumstances of this case, it  
21 appears that it would be exceedingly difficult to measure all  
22 of the harms that are likely to occur in those three  
23 categories.

24 Q. So if we can take each of these --

25 THE COURT: Could you give me those three again.

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1           THE WITNESS: The three categories of irreparable  
2 harm are, number one, profit erosion; number 2, impact on  
3 research and development activities; and, number 3, impact on  
4 customer relationships.

5           THE COURT: Okay.

6 BY MR. SUNG:

7 Q. And so let's take each of these harms in turn. What is  
8 profit erosion?

9 A. Profit is the difference between price and cost. In this  
10 case, if infringement were allowed to continue, there would  
11 be a negative impact on the price trajectory and a positive  
12 impact on the cost trajectory. In other words, the profits  
13 would be squeezed because of the competition.

14 Q. And would Cargill's entry into the market put any  
15 downward pressure on Nuseed's prices for Aquaterra?

16 A. Yes. It's one of the basic precepts of economics, and  
17 that is, competition often leads to price reduction.  
18 Companies often compete directly with one another by offering  
19 lower prices, and that is likely to occur in this business  
20 place.

21 Q. Now, are you suggesting that Nuseed should be able to  
22 charge monopoly prices?

23 A. Absolutely not. Both companies are competing to be  
24 alternatives to and supplements to fish oil. So fish oil is  
25 still out there and dominates the marketplace. So the

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1 existence of fish oil will constrain the pricing that both  
2 companies can engage in. If they attempted the price too  
3 high, fish oil would take all of that business.

4 Q. And would Cargill's entry into the marketplace increase  
5 Nuseed's costs?

6 A. Yes. In at least two dimensions -- and Ms. Boettner  
7 talked about some of those earlier today -- it would result  
8 in Nuseed engaging -- having to incur more marketing costs  
9 than it otherwise would have in order to both keep and  
10 attract a customer base, so increase in marketing costs. And  
11 there's also an increase in production costs, that is,  
12 economies of scale or learning curve effects would not be  
13 realized.

14 Q. And have you seen any evidence that Nuseed expects its  
15 cost to production to decrease with volume and experience?

16 A. Yes. I've seen documents from the company that are  
17 consistent with normal economic principles, and that is, over  
18 time companies learn, both because of volume and simply time  
19 in the business, and by learning more about the business,  
20 they reduce their costs. That's called economies of scale or  
21 sometimes learning curve effects. The cost can occur both  
22 straight production costs and of developing relationships  
23 with growers.

24 By not being far enough down the experience or time  
25 curve, the company will not be able to realize the gains that

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1 it otherwise be able to realize, and I've seen that in some  
2 of the Nuseed documents.

3 Q. Okay. Can you turn in your binder, please, to CX-0928.

4 A. I'm there.

5 Q. And do you recognize this document?

6 A. I recognize this general document. Are you wanting me to  
7 look at a particular page?

8 Q. Well, if you flip through it, my question is going to be:  
9 Is this the type of document that you would normally rely  
10 upon as an expert in rendering your opinion?

11 A. Absolutely. This is investor day slides in which -- as I  
12 recall, in which the company that is Nuseed talked about the  
13 business that it's in and hoping to continue to be in.

14 MR. SUNG: Your Honor, we'd like to move the  
15 admission of CX-0928 into evidence.

16 THE COURT: That document will be admitted.

17 (Exhibit CX-0928 received in evidence.)

18 BY MR. SUNG:

19 Q. Mr. Jarosz, can I refer you to particularly Bates number  
20 ending 789 within this set.

21 A. Yes, I'm there.

22 Q. And once you're there, if you could tell us, what does  
23 this slide describe to you?

24 A. This shows precisely the concept that in economics we  
25 know as scales of economies or learning curve effects. One

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1 sees that early on, on the left-hand side toward the  
2 beginning of the project, or what's called launch, the costs  
3 are fairly high.

4 But over time, as the company learns about the  
5 business and learns how to succeed in the business, the costs  
6 go over time -- reduce over time. So you'll see what is  
7 fairly high on the left-hand side because quite a bit lower  
8 on the right-hand side because the company has learned more  
9 and have a larger scale within which to work on reducing its  
10 costs.

11 Q. So what effect does Cargill's entry into the marketplace  
12 have on Nuseed's ability to realize these cost reductions?

13 A. It slows the ability of Nuseed to be able to move down  
14 that learning curve. In other words, it will be stuck more  
15 toward the left-hand side than the right-hand side because  
16 the volumes will be substantially lower. The ability to  
17 learn will be much lower because the company will be  
18 defending its position in the market rather than working on  
19 economies of scale.

20 Q. In your opinion is the harm that Nuseed is likely to  
21 suffer due to profit erosion quantifiable in this case?

22 A. It's extremely difficult to adequately quantify here, for  
23 a couple of reasons. The first is, we don't know exactly  
24 what the price trajectory is going to be. We all know the  
25 products have not been for sale yet. So we don't know for

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1 sure what the selling price will be. As a result, we don't  
2 know what the trajectory of selling prices will be, and as a  
3 result of that, we don't know what the impact of competition  
4 will be.

5 Will it reduce prices 10 percent, 50 percent, or not  
6 at all? We don't know that because the business is just now  
7 beginning on the commercial scale.

8 Secondly, we don't know what the cost structure will  
9 look like for the same reasons the newer company has been in  
10 full commercialization yet, there have not been sales. So we  
11 don't know what the cost curve will look like for Nuseed as a  
12 result. We don't know what the trajectory will look like,  
13 and as a result of that, we don't know precisely what the  
14 impact of the competition will be, how it might change that  
15 line.

16 Q. And why is price erosion irreparable here?

17 A. For the reasons that I just explained, that is, we don't  
18 know what the prices will be, we don't know what the  
19 trajectory will be, and we don't know what the impact of the  
20 competition will be on that trajectory.

21 Q. So let's move on to the second type of harm you've  
22 identified. Can you explain what sort of harm Nuseed may  
23 suffer with respect to product development?

24 A. Nuseed will have less resources to be able to invest in  
25 its own business. That means it won't be able to extend upon



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1 and improve Nutriterra. Moreover, it will be less able to  
2 develop new applications than it's hoping to develop. In  
3 this case we know that applications for the human market is  
4 quite important to both companies. Things like food and  
5 beverage or supplements or nutraceuticals is the next wave  
6 beyond aquaculture.

7 But if the company is forced to defend its position  
8 in the aquaculture business and generates less money from  
9 that business, it will not be in a position to develop the  
10 human, direct human applications at the rate it was hoping it  
11 would.

12 Q. And why is the impact of Cargill's presence in the  
13 marketplace on Nuseed's product development likely to be  
14 irreparable harm?

15 A. We don't know precisely what new projects Nuseed will  
16 invest in. We don't know what the success rate of those  
17 extensions will be. As a result, we don't know what the  
18 impact of the competition will be. Will it halt all  
19 development? Will it slow development or will it have no  
20 impact? We just don't know.

21 Q. So let's discuss the last item that you had mentioned,  
22 customer relationships.

23 How does Cargill's entry into the marketplace affect  
24 Nuseed's customer relationships?

25 A. As we heard Ms. Boettner talk about, the company is

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1 attempting to develop customer relationships. It's been  
2 working on that for many months. But there are not yet  
3 customers who have signed contract for the purchase of  
4 Nutriterra.

5 We don't know what customers will be developed over  
6 what time frame. The impact of the competition will,  
7 undoubtedly, have some impact on the development and  
8 retention of new customers.

9 Q. And why is that impact, the impact of Cargill's entry  
10 into the marketplace on Nuseed's customer relationships  
11 likely to be irreparable here?

12 A. We don't know what customers will ultimately choose  
13 Nutriterra. We don't know at what scale they will be sending  
14 their business to Nuseed. And as a result, we don't know  
15 what the competitive impacts will be since we don't know what  
16 the trajectory would be without the competition.

17 Q. You've just mentioned Nutriterra a moment ago. Is that  
18 the product you're talking about with respect to --

19 A. I meant Aquaterra. I misspoke. I'm sorry.

20 Q. Would you be able to reliably quantify unobserved  
21 customer relationships that may have formed in the absence of  
22 Cargill's entry into the marketplace?

23 A. No.

24 Q. What are the particular circumstances that play in this  
25 case that would make quantifying the damage done to Nuseed

—Jarosz, J. - Direct—

1 due to Cargill's entry particularly difficult?

2 A. There are four characteristics of this business that bear  
3 on the irreparable issue quite importantly: Number one, this  
4 is a new to market, a first-time product. There's not been a  
5 canola-based source of omega-3 until now, and the market has  
6 not known how it will accept that new product. So it's a  
7 brand-new business that's being developed.

8 Secondly, you have the issue of a first mover.  
9 Nuseed was planning to be the first mover in this business,  
10 and first movers typically have advantages over later movers.  
11 Because of the competition from Cargill, that first mover  
12 advantage is likely to be impacted, but we don't know how  
13 much. It's difficult enough to measure first mover, and then  
14 to figure out what the impact of an altered first mover is  
15 exceptionally difficult.

16 The third characteristic of this business is that  
17 it's a worldwide business, so the patents here or U.S.  
18 patents, but the business is run throughout the world, in  
19 Chile, for example. And so things that happen in the  
20 United States reverberate, but unclear exactly how in other  
21 geographic markets. So that's the third characteristic.

22 And the fourth characteristic is that this  
23 technology is what we economists call a platform technology.  
24 Mr. Zacharias, Ms. Boettner talked about that. I talked  
25 about it a few minutes ago. Both companies are hoping to use

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1 the aquaculture product and move more directly into the human  
2 markets with food and beverages, food supplements,  
3 nutraceuticals.

4 The company's had hopes that this technology will  
5 become ubiquitous. Those are the characteristics of this  
6 business that make it particularly difficult to quantify what  
7 the harm could be in the future to a dollar amount and  
8 express that today.

9 Q. Now, would a reasonable royalty apply to future sales  
10 fully compensate Nuseed for the damage here?

11 A. No, not if the reasonable royalty is dependent only on  
12 past licenses. But we have so many other things going on,  
13 the profit erosion, the impact on customer relationships, the  
14 impact on research and development that aren't reflected in  
15 the preexisting licenses in this business.

16 So if a royalty were reliant on those preexisting  
17 licenses, we would be losing large measures of potential  
18 harm.

19 Q. So in addition to irreparable harm, are there other  
20 factors you considered in your analysis of whether injunctive  
21 relief is appropriate here?

22 A. Yes. The balance of the hardships and public interest.

23 Q. What does the balance of the hardships mean as it relates  
24 to injunctive relief?

25 A. We're asked to weigh, as I understand it -- and this is

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1 one of the factors that comes from a famous Supreme Court  
2 case -- to weigh the harm to Nuseed if there's not an  
3 injunction versus the harm to Cargill if there is an  
4 injunction. So we're trying to weigh the hardships to both  
5 parties.

6 Q. And did your analysis consider the relative importance of  
7 long-chain omega-3 canola oil to each of the parties here?

8 A. Yes. And I had quite a bit of evidence on the  
9 significance of this project to Nuseed. In fact, I  
10 understand it was really one of the primary reasons for the  
11 development of the company, that is, to further develop this  
12 product line and bring it to the marketplace. One sees  
13 throughout the documents the significance of the canola-based  
14 omega-3 technology to Nuseed.

15 Q. And is the prior Exhibit CX-0928 one of those documents  
16 you referred to reach that determination?

17 A. Yes, it is. One sees throughout this presentation  
18 mention of the significance of this program.

19 Q. And in your review of similar documents from BASF and  
20 Cargill, did you see an equal emphasis on the importance of  
21 long-chain omega-3 canola oil to those parties?

22 A. I did not see the same kind of emphasis. Both those  
23 parties are involved in lots of other projects, and I didn't  
24 see the significance of this project in the same way that I  
25 saw the significance of this project to Nuseed.

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1 Q. So over all what did you conclude about the balance of  
2 hardships in this case?

3 A. They seemed to favor Nuseed, that is, in position of an  
4 injunction would protect the position that's extremely  
5 important to Nuseed, and it's a position that appears to have  
6 somewhat less significance to BASF and Cargill.

7 Q. And how did your analysis of whether injunctive relief is  
8 appropriate here, taking into consideration the public  
9 interest?

10 A. I realize that they're somewhat competing interests here.  
11 The patent system wants to protect innovation and wants to  
12 encourage further innovation. On the other hand, competition  
13 can result in reduced prices. So I needed to examine which  
14 factor predominated here.

15 Q. And why is it important from an economic perspective to  
16 protect patented inventions?

17 A. It's the whole reason why the patent system exists, that  
18 is, it wants to give inventors and innovators protection for  
19 the substantial investments that they made, so it grants a  
20 limited monopoly for those companies and individuals to  
21 recoup the investment.

22 The patent system encourages innovation and it  
23 encourages innovation not only by big companies but small  
24 companies, and not having that protection here would send a  
25 signal to potential innovators that their innovations may not

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1 be as protected as they had hoped.

2 Q. And how would public interest be impacted should Cargill  
3 be allowed to remain in the marketplace?

4 A. The impact is that there would be less confidence in the  
5 patent system. Nuseed has already prevailed on liability.  
6 Nuseed has prevailed in showing that its patents are valid,  
7 enforceable, and infringed. If a permanent injunction is not  
8 granted, there will be less certainty among innovators that  
9 their positions will be protected in the future.

10 Q. And, alternatively, how is the public interest impacted  
11 should an injunction issue here?

12 A. The supply of canola-based omega-3 is likely to be quite  
13 substantial. You heard from Ms. Boettner and, I think,  
14 Mr. Zacharias, as well, that this is a very scaleable  
15 business. In other words, it can be expanded. One needs to  
16 grow more crops.

17 So there certainly is a fish oil gap. Nuseed  
18 believes it can meet much of that gap, and depending on the  
19 year, perhaps all of it, because the scaleability is quite  
20 agreeable to the company. This is a technology that can fill  
21 much of that fish oil gap.

22 Q. Would an injunction preventing Cargill from entering the  
23 long-chain omega-3 canola marketplace prevent Cargill, under  
24 any circumstances, from entering the market?

25 A. No. It has at least two options open to it. One, is to

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1 design around the patents, in other words, attempt to remain  
2 in the business but not use the CSIRO and GRDC and Nuseed  
3 intellectual property.

4 But, secondly, they have the ability to come and  
5 negotiate a license with the proponents. That is, an  
6 injunction often leads to further negotiation, one in which  
7 the parties figure out what terms are fair going forward.

8 Q. And so overall what is your opinion as to whether  
9 injunctive relief is appropriate here?

10 A. Based on the facts and circumstances of this case, it  
11 appears that injunctive relief is the most appropriate form  
12 of relief.

13 Q. So I'd like to turn back and address with you the aspect  
14 of future ongoing royalties. Alternatively, to your  
15 injunctive analysis, what other form of damages did you deem  
16 appropriate in the absence of injunctive relief?

17 A. A reasonable royalty.

18 Q. And would lost profits not be appropriate here?

19 A. Not for anything in the past because as has been  
20 established, there have not been commercial sales. So there  
21 are no losses in that dimension that Nuseed has incurred.  
22 That's not to say it hasn't been harmed, but there are no  
23 sales that have been lost by the company to date. The  
24 future, however, may be a very different story.

25 Q. Can you tell us about the methodology you used to



—Jarosz, J. - Direct—

1 determine the amount that a reasonable royalty should be for  
2 ongoing royalties?

3 A. I used a hypothetical negotiation construct.

4 Q. And can you describe what that is?

5 A. It can be thought of as a license fee that should have  
6 been paid by the infringer to the owner of certain patent  
7 rights, and it's established based on setting up a bargaining  
8 negotiation that we know never really existed but should have  
9 existed. That is, what should have happened if the parties  
10 sat down at a negotiating table and instead of infringement,  
11 there was a license that was entered into?

12 Q. So here in this case, how is it possible to calculate  
13 what royalty the parties should have agreed to for the  
14 patents had they conducted this negotiation before first  
15 infringement?

16 A. We have three sets of facts that are quite useful in  
17 determining the outcome of a hypothetical negotiation. One  
18 is licenses and agreements covering the patent rights at  
19 issue here or something very close to those patent rights.  
20 Number two, we have information on BASF and Cargill's  
21 projected gains from infringing as of the point of this  
22 negotiation. And third, we have information on CSIRO, GRDC,  
23 and Nuseed's projected losses out into the future if  
24 competition were to continue from Cargill.

25 Q. And in this case is such evidence to support those

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1 available?

2 A. Yes. I have evidence on all three of these dimensions.

3 Q. And is that evidence quantitative or qualitative?

4 A. We economists view it as quantitative. It's data, but I  
5 also consider it a set of qualitative factors that impacts  
6 any negotiation, including a hypothetical negotiation.

7 Q. And when did you -- or what date did you apply to the  
8 hypothetical negotiation in this case?

9 A. November of 2018.

10 Q. And are you aware whether both sides agree to that date?

11 A. Yes, I think there's agreement on that.

12 Q. And so you mentioned you had looked at a number of  
13 different comparables but you had focused on two in  
14 particular. Can you describe what those were?

15 A. Yes. I'm not sure if I fully mentioned that. I looked  
16 at a number of licenses, a couple dozen licenses, but I found  
17 two in particular that were extremely useful, and I  
18 summarized those in a slide.

19 Q. And can you walk us through what is on this slide?

20 A. The first is the set of agreements between CSIRO and GRDC  
21 on one hand and Nuseed on the other hand. Those agreements  
22 were entered into in 2010, and those covered the very patents  
23 that we're talking about here.

24 They provided -- those agreements provided that  
25 Nuseed would pay 25 percent of what it calls net sales, but

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1 it's something less than that sales. It's some measure of  
2 profits that we'll get into in a few moments.

3 The second agreement is between BASF on one hand and  
4 Cargill on the other hand, which was entered in 2011. This  
5 covered the BASF inventions that presumably allowed for  
6 canola-based omega-3 oils, and the patented inventions were  
7 licensed or shared with Cargill such that Cargill agreed to  
8 pay 40 percent of all positive product EBITs. So, in other  
9 words, years in which there were positive profits, Cargill  
10 agreed to pay 40 percent as a license fee to BASF for access  
11 to that technology.

12 Q. Now, you had mentioned that you had other type of  
13 evidence used in applying this hypothetical negotiation,  
14 particularly what the infringer stood to gain from the  
15 infringement. What kind of evidence did you use for this?

16 A. I had profit -- revenue and profit projections made at  
17 about November of 2018 by Cargill in profit-and-loss  
18 statements.

19 Q. If you can turn to your binder to CX-0483.

20 A. I've done that.

21 Q. And, Mr. Jarosz, is this the type of document that you  
22 would normally rely upon to render your expert opinion?

23 A. Yes, it is.

24 THE COURT: 0483. Okay.

25 MR. SUNG: Your Honor, we would move the admission

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1 of CX-0483 into evidence.

2 MS. SHAW: Your Honor, we'd object to the extent  
3 this is not the most recent --

4 THE COURT: I'm sorry. I can't hear you.

5 MS. SHAW: We object. This is not the most recent  
6 Cargill projection that's available.

7 THE COURT: It's not the most recent one available?

8 MS. SHAW: Yes, Your Honor. It's an outdated  
9 projection.

10 MR. SUNG: And, Your Honor, we would just say that  
11 this is what was available at the time of Mr. Jarosz's  
12 opinion.

13 MS. SHAW: I don't believe that's true. And also  
14 updated -- and also Mr. Jarosz has provided supplemental  
15 reports, and he has elected not to submit a supplemental  
16 report with updated Cargill information that was available.

17 THE COURT: Well, I'm going to overrule the  
18 objection. I think that goes to the weight rather than the  
19 admissibility of the evidence.

20 BY MR. SUNG:

21 Q. Mr. Jarosz, if we move to the next slide with you, can  
22 you tell us, is this information that is summarized from  
23 CX-0483?

24 A. Yes, it is. And that projection, by the way, was done  
25 just at about the same time as the hypothetical negotiation,

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1 so that's what's at most relevance to me.

2 THE COURT: Well, it says fiscal year ending May  
3 31st. Do we know what year?

4 THE WITNESS: The year is below in the next row,  
5 Your Honor. So it's fiscal year ending May 31 in the first  
6 column 2020, and then 2021, and then 2022. They meant fiscal  
7 year ending May 31 to be appropriate for each column heading.

8 THE COURT: All right. So this was the one starting  
9 in 2020, which -- but what I was trying to find out was the  
10 date the projection was made.

11 THE WITNESS: Your Honor, it was in late 2018. My  
12 memory is that it was October of 2018, but I could  
13 double-check that, but it's roughly in that time frame.

14 THE COURT: Okay.

15 MR. SUNG: And, Your Honor, just for housekeeping,  
16 we just wanted to confirm that CX-0483 is in evidence?

17 THE COURT: Yes.

18 (Exhibit CX-0483 received in evidence.)

19 MR. SUNG: Thank you, Your Honor.

20 BY MR. SUNG:

21 Q. What profits did Cargill project from selling its  
22 long-chain omega-3 canola oil?

23 A. You can see at the middle column under the dollar sign  
24 the profits that it was projecting were \$264.7 million. The  
25 MM stands for millions, and EBIT is the measure of profits on

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1 the left. That is earnings before interest and taxes that  
2 equates to a profit rate, which is what is relevant for the  
3 hypothetical negotiation of 28.2 percent.

4 So for every \$1.00 of revenues associated with this  
5 product line, the company was expecting \$0.28 in profits  
6 after accounting for all expenses.

7 Q. And could Cargill earn its projected operating profit  
8 without a license to the infringed patents?

9 A. I understand it could not. Dr. Kunst testified about  
10 this, that each one of the infringed patents is a blueprint  
11 to get to DHA, and then without having legal access to the  
12 blueprint, Cargill could not commercialize and sell the  
13 product.

14 Q. Now, you mentioned another type of evidence used in  
15 applying the hypothetical negotiation evidence about what the  
16 patent owner stood to lose from the infringement. What kind  
17 of evidence did you rely upon for this?

18 A. I, as well, had projections on expected performance in  
19 the business for Nuseed. I had a profit and loss projection  
20 upon which I relied.

21 Q. And if you can turn in your binder to CX-0964. Do you  
22 recognize this document?

23 A. Yes. This is a document upon which I relied to  
24 understand what Nuseed was expecting or hoping its  
25 performance would be in this business going forward from a

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1 revenue and profit standpoint.

2 Q. And is this the type of document that you would normally  
3 rely upon in rendering your expert opinion?

4 A. Yes.

5 MR. SUNG: Your Honor, we'd like to move the  
6 admission of CX-0964 into evidence.

7 MS. SHAW: No objection.

8 THE COURT: That will be admitted.

9 (Exhibit CX-0964 received in evidence.)

10 BY MR. SUNG:

11 Q. Mr. Jarosz, is the slide being shown now taken from  
12 CX-0964 for summary purposes?

13 A. For the most part, yes.

14 Q. And can you describe for us what this slide shows?

15 A. It shows that over the forecast period Nuseed was  
16 projecting about \$8.6 billion in revenues and about \$4.2  
17 billion in profits. You'll see the 4.2 at the bottom. That  
18 equates to a profit margin accounting for all expenses of  
19 49.1 percent.

20 So over the life of this projection, the company was  
21 expecting for every dollar in revenues for Aquaterra, it  
22 would realize \$0.49 in fully loaded profits.

23 Q. And this slide is labeled "conservative pricing  
24 scenario." Can you explain why that is?

25 A. Yes. When I looked at the estimate that was made by

—Jarosz, J. - Direct—

1 Nuseed, I felt that the projections of price were, perhaps, a  
2 bit aggressive, based on my understanding of fish oil prices.  
3 So I adjusted downward the prices embedded in these  
4 projections to account for what I think are, perhaps,  
5 somewhat more reasonable and more recent expectations of what  
6 the prices for Aquaterra will be.

7 Q. Okay. Now I'd like to discuss the result of your  
8 reasonable royalty analysis. Earlier you talked about  
9 royalties ranging from 12.4 percent upwards. Can you explain  
10 where the 12.4 percent number comes from?

11 A. If I take the agreements that were entered into between  
12 CSIRO and GRDC on one hand and Nuseed on the other hand, so  
13 that 2010 set of agreements, and then I asked myself, what  
14 would BASF and Cargill pay under those agreements, so I put  
15 in numbers that were specific to the company from its  
16 projections, and that arrived at a number of 12.4 percent.

17 Q. Okay. If we can move to the next slide. Does this slide  
18 show how you reach that calculation?

19 A. It does.

20 Q. And can you describe that for us?

21 A. Sure. The way the calculation is done is one starts with  
22 long-chain omega-3 canola revenues in that purple chart and  
23 subtracts from that the value of commodity canola, so the  
24 non-improved canola. Then subtracted from that were some  
25 certain specified costs in the contract. The result is



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1 something called value added under the contract.

2 The royalty payment to the owner of the patented  
3 technology was 25 percent of that value added. So 25 percent  
4 of the value added is \$117.4 million in the small green bar  
5 at the right.

6 Q. And if we can move to the next slide. Does this show  
7 your math?

8 A. It does. I then converted that royalty payment to a  
9 payment on a revenue basis. So I took the 117.4 million  
10 divided by 939.7 million in revenues to arrive at a royalty  
11 rate per dollar of 12.4 percent.

12 Q. Now I'd like to ask you briefly about the other side of  
13 the range. Can you explain where that number came from?

14 THE COURT: All right. So you applied that to  
15 revenues?

16 THE WITNESS: Yes.

17 THE COURT: Not the profits, but the revenues?

18 THE WITNESS: Correct. The contract took a portion  
19 of profits, and so I just asked myself, what would that be as  
20 a portion of revenues? And that's what the 12.4 percent  
21 represents.

22 THE COURT: Go ahead.

23 BY MR. SUNG:

24 Q. So I'd like to ask you about the other end of the range,  
25 the 49.1 percent. Can you explain how you arrived at that

—Jarosz, J. - Direct—

1 number?

2 A. That's the number that we saw earlier. That is Nuseed's  
3 projections for its performance out into the future. It was  
4 the calculation that I did associated with every additional  
5 dollar of revenues resulting in \$0.49 in profits. That's  
6 where the 49.1 percent comes from.

7 Q. With that type of wide range that you've laid out here  
8 for us, Mr. Jarosz, does that, in your mind, speak to  
9 anything with respect to injunctive relief appropriateness?

10 A. It says there's lots of uncertainty in this business, and  
11 this is just based on the evidence we've talked about for the  
12 last few moments, that is, what the prices will be, what the  
13 volumes will be, what the costs will be, what the acceptance  
14 of the product will be. We just don't know. So that's, in  
15 large part, why I have such a wide range of outcomes because  
16 no one knows for sure and opinions have changed over time  
17 quite a bit.

18 Q. Now, you had mentioned earlier that you looked at both  
19 quantitative factors as well as qualitative aspects. Can you  
20 explain the qualitative approach you undertook?

21 A. Those come from the patent opinion in *Georgia-Pacific*.  
22 That is the case that laid out 15 factors that can be  
23 considered in determining what the outcomes of a hypothetical  
24 negotiation would be. Those factors I've summarized on the  
25 slide that's on the screen.

—Jarosz, J. - Direct—

1 Q. And how did you use the factors in conjunction with the  
2 quantitative analysis you performed?

3 A. Well, I started knowing that a quantitative range,  
4 according to my analysis, is 12.4 to 49.1 percent. And I  
5 asked myself, based on the *Georgia-Pacific* factors, should  
6 the outcome be toward the low end of that range, or should it  
7 be toward the high end? So I used the factors to tell me  
8 where an ultimate number may best lie.

9 Q. Okay. And if we turn to the next slide, can you tell us  
10 what this slide shows based on your analysis?

11 A. It shows the *Georgia-Pacific* factors. Some provided very  
12 little additional guidance, so I didn't have much  
13 information. Those are grayed out. Some of them suggested  
14 that the rate should be toward the high end under  
15 consideration, and some of them suggested the rate should be  
16 the low end, toward the low end under consideration.

17 So the green arrows for factors 1, 2, 4, 5, 6, 9,  
18 and 10 suggest a number toward the high end might be most  
19 appropriate here. The red downward pointing arrows for 3, 8,  
20 and 11 suggest that the royalty rate might best be put toward  
21 the low end of the consideration range.

22 Q. So if we can walk through these. For factor 1 there look  
23 likes an upward pointing arrow. Why is that?

24 A. I left a quite a number of licenses. The one that I  
25 found most useful was the one that covered these patented

—Jarosz, J. - Direct—

1 inventions, the 2010 agreement between CSIRO and GRDC on one  
2 hand and Nuseed on the other hand.

3 When those agreements were entered, there was  
4 uncertainty about the strength of the patent rights. There  
5 was a cloud of uncertainty. Whenever there's uncertainty,  
6 rates tend to be moderated. When that uncertainty is  
7 removed, as is the case here, because the jury found five of  
8 the patents, in fact, to be valid, enforceable and infringed,  
9 then the rates should go up, in other words, the patent  
10 owner's power is stronger at a negotiation than in a  
11 situation where there is still uncertainties about the  
12 patents.

13 Q. Let's turn to factor 2. Why is that associated with an  
14 upward pointing arrow?

15 A. It's a similar kind of analysis here. That is, the  
16 license that I found most useful in this category was the  
17 2011 agreement between BASF and Cargill. Just like the 2010  
18 agreement, there were uncertainties about the strength of the  
19 patent portfolio. Uncertainties tend to depress royalty  
20 rates.

21 With those uncertainties removed, because of the  
22 jury's verdict here, the rate should go up from what it  
23 otherwise would have been.

24 Q. Okay. Turning to factor 3, that looks like a downward  
25 pointing arrow. Why is that?

—Jarosz, J. - Direct—

1 A. A number of the licenses, including the ones that I  
2 looked closely at here, were exclusive licenses, meaning  
3 there's only one authorized user of the patent rights.  
4 Exclusive licenses are quite valuable and command high rates.

5 In a hypothetical negotiation, we're assuming a  
6 nonexclusive license from the patent owner to the infringer,  
7 so that says that the rate should be brought down versus a  
8 situation in which there's an exclusive license.

9 Q. So is a nonexclusive license generally less valuable than  
10 an exclusive one?

11 A. Yes. And people pay less money for nonexclusive licenses  
12 than they do for exclusive licenses.

13 Q. Turning back to four. It looks like it's an upward  
14 pointing arrow there. Why is that?

15 A. This asks us to evaluate what the licensing program has  
16 been, and in the case of Nuseed and CSIRO and GRDC, they've  
17 been interested in having a business relationship, a  
18 collaborative relationship with a partner, but they've not  
19 been interested in simply licensing out their rights. They  
20 wanted to co-develop. In situations where they've licensed,  
21 it was in co-development settings.

22 So, as a result, this hypothetical license is not  
23 that. This is a straight one-way license. So the rate  
24 should be higher than it would be between companies that are  
25 partnering with one another in business.

—Jarosz, J. - Direct—

1 Q. And why does this exclusivity put upward pressure on the  
2 royalty?

3 A. Because in this particular case Nuseed is interested in  
4 continuing its collaborative relationship with CSIRO and  
5 GRDC. They're not interested in allowing other participants  
6 in this business. Moreover, the license between CSIRO and  
7 GRDC on one hand and Nuseed on the other hand is an exclusive  
8 license. CSIRO doesn't really even have the ability to grant  
9 other licenses.

10 Q. And how about factor five, the commercial relationship  
11 between the parties? Can you explain that factor?

12 A. In situations where companies are vigorous competitors in  
13 the marketplace, they tend to license one another at high  
14 rates because they are threats to one another. These two  
15 companies have been, and will continue to be, direct  
16 competitors in this space. They have been competitors for a  
17 long time and will continue to be competitors if Cargill  
18 remains in the business.

19           These are the only two companies that have received  
20 regulatory approval for a canola-based or even a plant-based  
21 source of omega-3 fatty acids. So they compete directly with  
22 one another. Situations in which parties are competing with  
23 one another are situations in which royalty rates tend to be  
24 higher than where the companies are cooperators.

25 Q. All right. How about factor six?

—Jarosz, J. - Direct—

1 A. This goes to what we were talking about before, the  
2 platform technology. That is, are we just talking about one  
3 particular product line or a product line that will foster  
4 other developments in the business? Ms. Boettner and  
5 Mr. Zacharias talked about using this technology to make  
6 further entries into the human business, and even as late as  
7 2018 Cargill has talked about entering the human business;  
8 food and beverages, nutraceuticals, food supplements. So  
9 both parties want to use this technology to extend more  
10 broadly. That's a situation in which a royalty rate should  
11 be toward the high end.

12 Q. Factor eight.

13 A. Factor eight talks about -- and I look at that and 11  
14 together. That is, to what extent has the set of products at  
15 issue met with success in the marketplace? We all know that  
16 there have not yet been commercial sales of the product. As  
17 a result, there have not been commercial products. So  
18 there's no historical basis upon which to say the rate should  
19 be higher than otherwise. So this says the rate should be  
20 low because we don't know precisely how successful these  
21 products will be from a revenue standpoint or from a profit  
22 standpoint.

23 Q. And let's look at 9 and 10 together.

24 A. These factors ask us to determine how important are these  
25 patented inventions, and the jury has already provided an

—Jarosz, J. - Direct—

1 opinion that there's been infringement of valid, enforceable  
2 patents.

3 We know the patents are breakthrough, according to  
4 Dr. Kunst. They're blueprints for getting to DHA. I also  
5 understand that these inventions are scaleable. They can be  
6 extended quite broadly, and they are very attractive,  
7 sustainable alternative to fish oil.

8 Q. Now, before we leave this slide, I'd like to ask you  
9 about one of the factors that doesn't have an arrow next to  
10 it, factor 13. Did you take this into account?

11 A. Yes, I did.

12 Q. And how so?

13 A. This asks us to determine a portion of whether there  
14 needs to be further apportionment in the estimation of  
15 damages, and here we actually have two forms of apportionment  
16 that are addressed, and I have a slide that shows those.

17 Q. And could you walk us through this analysis.

18 A. Sure. The first form of apportionment is between  
19 intellectual property rights and other rights. So Cargill's  
20 project Latitude can be thought of as having those two  
21 bundles of rights.

22 I examined roughly two dozen industry agreements,  
23 including the 2010 and 2011 agreements that we've been  
24 talking about, and those already give us a breakdown of IP,  
25 or intellectual property rights versus other rights. In



—Jarosz, J. - Direct—

1 other words, they're payments associated with some of the  
2 profits but not all of the profits. Many of the profits go  
3 to provide compensation for the other assets. So that  
4 apportionment is already accounted for. But then there's a  
5 second form of apportionment.

6 Q. And can you describe what that is?

7 A. That is, we're asked to determine within the bundle of  
8 patent rights how much should be apportioned or attributable  
9 to these individual patents. Two things are extremely  
10 important in this investigation. That is, the agreements  
11 that we talked about so far, which is the first oval, and  
12 Dr. Kunst's opinion, which is in the second oval.

13 Dr. Kunst said that each patent covers the  
14 blueprint, each one of the patents in the Group A covers the  
15 entire blueprint, and, moreover, she told me there weren't  
16 ways to develop non-infringing alternatives.

17 Moreover, if you look at the agreements, the ones  
18 that are in the left oval or the one in the middle of the  
19 page, those agreements provide that full payment is made even  
20 if only one of the patents covered is enforced. In other  
21 words, the patent, the last two expire patents commands the  
22 same rate as the entire bundle or portfolio of patents. So  
23 those facts together sets the apportionment, is accounted for  
24 such that each one of the patents can command the full rate.

25 THE COURT: How much longer are you going to be with

—Jarosz, J. - Direct—

1 this witness, counsel?

2 MR. SUNG: Actually, less than five, Your Honor.

3 THE COURT: What?

4 MR. SUNG: Less than five minutes, sir.

5 THE COURT: All right.

6 BY MR. SUNG:

7 Q. So taken together, what was your *Georgia-Pacific* analysis  
8 indicating about the outcome of the hypothetical negotiation?

9 A. Considering the *Georgia-Pacific* factors, the outcome  
10 should be toward the high end of the range under  
11 consideration. Remember, I had the range of 12.4 to 49.1  
12 percent. The factors suggest something towards the high end,  
13 but there's tremendous uncertainty. That's why I've  
14 presented this fairly broad range.

15 Q. Turning back to just one last point, you're aware that  
16 Cargill has obtained USDA deregulation within the past couple  
17 of months?

18 A. Yes, I'm aware of that.

19 Q. And how does that impact your injunction analysis, if at  
20 all?

21 A. The threat from Cargill is more tangible than it was at  
22 the time that I wrote my report. At the time that I wrote my  
23 report, it was unclear when or even if deregulation would  
24 occur. It has occurred. Cargill is poised to enter the  
25 market and has sent notification to the market of its

—Jarosz, J. - Cross—

1 intentions.

2 Q. And very last point: With respect to the stipulation by  
3 BASF and Cargill that their products infringe the Group A  
4 patents, you are aware of that, are you not?

5 A. Yes, I am.

6 MR. SUNG: Pass the witness, Your Honor.

7 THE COURT: All right. When we interrupt a  
8 witness's testimony in the middle of it, so to speak, the  
9 requirement is that you not discuss your testimony with  
10 anyone during the interruption or consult any documents or  
11 other information so that you will return to the stand  
12 exactly as you leave it now.

13 With that, we'll take a 20-minute recess.

14 (Recess from 3:33 p.m. to 3:56 p.m.)

15 THE COURT: Are you ready to cross-examine?

16 MS. SHAW: May I proceed, Your Honor?

17 THE COURT: You may.

18 CROSS-EXAMINATION

19 BY MS. SHAW:

20 Q. Good afternoon.

21 A. Good afternoon.

22 Q. I wanted to ask you first off about a couple of things  
23 that you testified to in your direct examination. If you  
24 could take a look at CX-928. I think that's actually in your  
25 direct examination binder. So we'll try to get through that

~~Jarosz, J. - Cross~~

1 binder, these questions first, so I don't have you going back  
2 and forth.

3 THE COURT: What was that number?

4 MS. SHAW: CX-0928, Your Honor.

5 BY MS. SHAW:

6 Q. And if you could turn to the page ending in 16789.

7 A. All right. I'm there.

8 Q. And I believe in your direct examination you testified  
9 that the ability for Nuseed to reduce its costs was one of  
10 the harms that it would suffer if Cargill was allowed to go  
11 into the market; is that right?

12 A. Yes.

13 Q. Okay. I'd like to look at this chart here with you. Do  
14 you have an understanding of what value is represented by any  
15 of the bars in this chart?

16 A. No. That's not listed in the chart.

17 Q. And do you have an understanding outside of this document  
18 as to what value is associated with those bars?

19 A. Not outside this document. I see the document says "cost  
20 and scale."

21 Q. Okay. So all you have relied on is the series of bars  
22 that decrease in height through 2028 without having an  
23 understanding of what value or numbers are behind each of  
24 those bars; is that correct?

25 A. That's correct, yes.

~~Jarosz, J. - Cross~~

1 Q. And each of these bars are divided into three different  
2 colors; green, yellow, and orange. Do you see that?

3 A. I do, yes.

4 Q. And each of those colors represent a different type of  
5 cost associated with this particular product, right?

6 A. Yes.

7 Q. And those three different things are supply chain scale  
8 in orange, right?

9 A. Yes.

10 Q. Yellow for on-farm growing costs, right?

11 A. Yes. That's correct. Yes.

12 Q. And green for stewardship and IP, right?

13 A. Yes.

14 Q. Do you have an understanding of what costs are associated  
15 with supply chain scale?

16 A. Not generally. I would have an estimate or a guess, but  
17 I don't know for sure.

18 Q. Do you have any understanding of what costs are  
19 associated with on-farm growing?

20 A. I have some general sense as with the previous term what  
21 that means, but I don't know for sure if I'm right.

22 Q. Do you have any understanding of what costs are  
23 associated with stewardship and IP?

24 A. Not all the costs, no.

25 Q. Do you have an understanding of any of the costs with

—Jarosz, J. - Cross—

1 stewardship and IP?

2 A. I think they're generally having to do with stewardship,  
3 which is a program that growers need to or do follow in  
4 making sure that their activities are consistent with  
5 community needs, as I understand it.

6 Q. That's your understanding of stewardship?

7 A. That's my understanding, yes.

8 Q. And did you look at any additional documents that provide  
9 any back-up for the information appearing in this chart?

10 A. I do not recall specifically looking for back-up numbers  
11 for those.

12 Q. Did you discuss this chart with anyone from Nuseed?

13 A. I think perhaps at one time I spoke about this chart with  
14 Mr. Zacharias.

15 Q. And do you recall what Mr. Zacharias told you about this  
16 chart?

17 A. I think we generally talked about the learning curve and  
18 scale economies concept as reflected here, but I don't recall  
19 that we talked about specific numbers.

20 Q. Thank you.

21 I believe you also testified on direct examination  
22 that both Nuseed and Cargill would be going to the human food  
23 market. I might be mischaracterizing your words so please  
24 let me know if I'm incorrect about that.

25 A. I meant to say the human market or direct human market,

—Jarosz, J. - Cross—

1 which includes food and beverages, food supplements and  
2 nutraceuticals, as I understand it.

3 Q. As part of your opinion, you did review deposition  
4 testimony from Cargill's witnesses; isn't that right?

5 A. Yes.

6 Q. And you understand that Cargill currently has no plans to  
7 go into that market; isn't that right?

8 A. I saw the deposition testimony, I think it was Mr. Gromov  
9 on that topic. I also did see a late 2018 document that  
10 talked about the human market.

11 Q. And you understand that today, as we sit here in this  
12 courtroom, Cargill has no plans to go into the human markets;  
13 isn't that right?

14 A. I think he said they didn't have specific plans for that,  
15 if I remember correctly.

16 Q. I believe you also testified that Nuseed has not been  
17 interested in licensing its IP, that they were only looking  
18 for a deeper collaborative agreement; is that a correct  
19 reflection of your testimony?

20 A. I think they're interested in licensing to a  
21 collaborator. They wanted to have a business partnership,  
22 and in that context, they were willing to license, but not  
23 outside that context, to the best of my knowledge.

24 Q. Are you aware that Nuseed and BASF had straight licensing  
25 discussions in 2016 and 2017?

~~Jarosz, J. - Cross~~

1 A. Yes.

2 Q. And are you aware that those discussions did not include  
3 any collaborative relationship between the parties?

4 A. I believe they had a discussion about the fact that  
5 Nuseed would get access to BASF's Australian patent portfolio  
6 or some of the patents, and vice versa. So in that regard it  
7 was a business relationship. It wasn't a collaboration to  
8 jointly develop a product, but it was a situation where they  
9 would be assisting one another in the business.

10 Q. They would be providing cross-licenses to each other,  
11 that was the licensing discussion around, right?

12 A. That's right.

13 Q. Okay. Could you take a look at CX-181.

14 A. Which binder is that in?

15 Q. It might be in that direct binder. If it's not there, it  
16 will definitely be in your cross binder.

17 A. It's not in the direct binder. I'll look at the cross  
18 binder. I'm there.

19 Q. And CX-181 --

20 MS. SHAW: Your Honor, are you there?

21 THE COURT: Yes.

22 BY MS. SHAW:

23 Q. This is the license agreement between CSIRO, GRDC, and  
24 Nuseed?

25 A. Yes. CSIRO and GRDC on one side and Nuseed on the other.



—Jarosz, J. - Cross—

1 Yes.

2 Q. And I believe this exhibit has been admitted into  
3 evidence. Okay.

4 Now, let's just hold on to our space here or mark  
5 here on the license agreement. I wanted to ask you a  
6 question about something you testified on your direct  
7 examination, and if you could look at -- I don't know if we  
8 can pull up your slide 19.

9 A. I'm looking at that.

10 Q. Okay. And this is your slide where you talk about how  
11 the agreements essentially provide apportionment for you;  
12 isn't that right?

13 A. Within the patent portfolio, yes.

14 Q. Okay. And you had testified that essentially because the  
15 full rate applies until the last patent expires, that  
16 demonstrates that the royalty is tied to even one single  
17 patent within the portfolio; isn't that right?

18 A. In this agreement, in 181, yes.

19 Q. Okay. If you take a look on Page CSI -- the page ending  
20 in 90893 of CX-181. Could you take a look at that.

21 THE COURT: What were those numbers again?

22 MS. SHAW: The exhibit is CX-0181, and it is the  
23 page ending in 98093, and I'm going to direct your attention  
24 to Section 2.1 of the agreement.

25 THE WITNESS: I'm sorry to say it looks like this

~~Jarosz, J. - Cross~~

1 copy only has Bates numbers on the first two pages, and it  
2 doesn't have it after.

3 THE COURT: Well, that's the way mine is, too.

4 BY MS. SHAW:

5 Q. Do you see the page number 9 in the document itself?

6 A. Yes, I do.

7 Q. Okay. If you could turn to Page 9. And do you see  
8 Section 2.1?

9 A. Yes, I do.

10 Q. The royalties under this agreement are actually tied to  
11 the 20 years from the launch of the product, right?

12 A. It says, "Ends on the later of the expiry of the date  
13 that the last to expire patent or any relevant patent or 20  
14 years from the first launch." So it's the last date which  
15 could be the expiry of the last to expire patents.

16 Q. But it could also expire 20 years from the launch of the  
17 product, right?

18 A. If there's no patent that extends beyond that, yes. But  
19 this provides protection beyond that 20 years if the patent  
20 runs past that period.

21 Q. And you're aware that Nuseed has not yet launched its  
22 product, correct?

23 A. Not from a sale perspective, that's right.

24 Q. Okay. And you are aware that there are -- that if Nuseed  
25 launches its product, for example, next year in 2020, you

—Jarosz, J. - Cross—

1 would agree that Nuseed would have to pay royalties under  
2 this agreement until 2040, right?

3 A. I'm not an expert in interpreting this contract, but I  
4 believe it should go through the last to expire patent, which  
5 possibly is beyond 2040. I don't --

6 Q. Go ahead.

7 A. I don't know all the patents that will be issued during  
8 the life of this agreement.

9 Q. So you don't know if there are any patents that expire  
10 before 2040?

11 A. I would imagine that there are some, yes.

12 Q. I'm sorry. You don't know if there are any patents that  
13 expire after 2040?

14 A. Not today, I don't know that, that's correct.

15 Q. So if there -- if all the patents expire before 2040, you  
16 would agree that the term of the agreement continues after  
17 the expiration of the patents?

18 A. Yes, I would agree with that, as I understand this  
19 provision.

20 Q. And royalties would also be paid after the expiration of  
21 the patents, correct?

22 A. As I understand this agreement, yes.

23 Q. So royalty payments are not necessarily tied to the life  
24 of the patents in this agreement, correct?

25 A. Well, they are tied. They said past the expiry of the

—Jarosz, J. - Cross—

1 last to expire patent, which could be after 2040.

2 Q. So -- but you would have to pay patents, you would have  
3 to pay royalties even after a patent expires?

4 A. A patent could expire after 2040, and you would still  
5 make payment.

6 Q. And I'm asking you in the situation where the patents  
7 expire before 2040, you would be required to pay -- to pay  
8 royalties even after the patents expire under this agreement?

9 A. In that situation, yes, but that's not the only state of  
10 the world.

11 Q. In that particular situation, then the payment of  
12 royalties would not be limited to just for the life of the  
13 patent, correct?

14 A. Correct. But the provision says if a patent goes beyond  
15 2040, the rate is still in effect.

16 Q. Okay. So, Mr. Jarosz, your reasonable royalty range is  
17 the same today as it was when you wrote your report on May  
18 2019, isn't it?

19 A. Yes, I think that's right.

20 Q. And since that time a verdict has been entered that has  
21 determined that BASF is a co-owner of the Group B patents.  
22 Do you understand that?

23 A. Yes, I believe that to be the case.

24 Q. And you also understand that the proponents have dropped  
25 the Group C patent?

—Jarosz, J. - Cross—

1 A. I have heard that representation, yes.

2 Q. And you are also aware that proponents have dropped the  
3 Group D patent against Cargill's commercial lines?

4 A. I think that's right, although I'm a little bit confused  
5 what is happening with regards to the '541 patent.

6 Q. And you're also aware that the Group E patent has found  
7 to be invalid?

8 A. Yes, that's my understanding.

9 Q. Okay. And your royalty projections are based on sales of  
10 Cargill's commercial products, correct?

11 A. Yes.

12 Q. Okay. So although --

13 A. Sorry. You said my royalty sales. I guess I should --

14 Q. Your royalty calculations are based on projections of  
15 Cargill's commercial sales?

16 A. I don't have royalty damages into the future. I have a  
17 royalty rate into the future, if that's what you're getting  
18 at, yes.

19 Q. So your royalty rate into the future is based on  
20 Cargill's commercial products, correct?

21 A. Yes, that's one building block.

22 Q. So although only one of the five groups of patents  
23 asserted in this trial remain, with respect to Cargill's  
24 commercial products, your royalty remains unchanged; is that  
25 right?

—Jarosz, J. - Cross—

1 A. Yes. And I talked about that in my report, and you and I  
2 talked about that at my deposition.

3 Q. Okay. Now, your testimony has been excluded by a court  
4 on at least four separate occasions; isn't that right?

5 A. It's been limited on four or five or six, yes.

6 Q. Okay. And on one occasion your testimony was excluded  
7 because you failed to apportion out the value contributed by  
8 the patents at issue when calculating a royalty; isn't that  
9 right?

10 A. Yes, in a multicomponent electronics or software setting,  
11 yes.

12 Q. And in that case the judge was not convinced you had done  
13 sufficient allocation; is that right?

14 A. That's correct.

15 Q. Now, you understand that Cargill commercial lines have  
16 only been found to infringe the Group A patents, right?

17 A. That's my understanding. Well, and some part of the  
18 '541. I'm a little bit confused about that.

19 Q. So is it your understanding that Cargill's commercial  
20 lines have been found to infringe the '541 patent?

21 A. That's a good point. No, I think just the Group A  
22 patents.

23 Q. Thank you. And all your projections on Cargill's  
24 earnings in your expert report, those are based on sales of  
25 oil from Cargill's commercial lines, right?

—Jarosz, J. - Cross—

1 A. They're based on profits that are projected out into the  
2 future, yes.

3 Q. Okay. And all of the projected profits, if we could take  
4 a look at your slide 11, all of these projected profits that  
5 we see here, those are based on projected revenue from the  
6 Cargill commercial lines, right?

7 A. Yes. In this slide.

8 Q. They are not based on projected revenue from sales of the  
9 LFK elite event in BASF's research canola lines, right?

10 A. That's right.

11 Q. And the Group A patents expire in 2025, right?

12 A. Yep, as I understand it.

13 Q. So any royalties that BASF and Cargill would pay based on  
14 the rate in your report, those would end in 2025, right?

15 A. Yes. I'm not suggesting what the royalty base should be  
16 into the future, I use these numbers to calculate a royalty  
17 rate, the 28.2 percent.

18 Q. I understand. I just want to be clear. You would agree  
19 that proponents would not be entitled to any royalty based on  
20 sales of oil from Cargill's commercial lines after 2025,  
21 right?

22 A. I don't know for sure. Certainly, with regard to the  
23 Group A, I think the obligation would end, as I understand  
24 it, in 2025.

25 Q. Okay. Could you take a look at Jarosz slide 14. I think

~~Jarosz, J. - Cross~~

1 this is a slide you used in your direct testimony, and it  
2 describes how you calculated the Cargill royalty to be paid  
3 applying the formula in the proponents' agreement, which is  
4 what we looked at, CX-181, right?

5 A. Yes, I think that's a fair statement.

6 Q. And all of these numbers in these boxes, they contain  
7 values for different things, right?

8 A. Yes.

9 Q. And the number, for example, the values that you've  
10 pulled here, all these numbers, they cover the value of  
11 things over a particular date range, right?

12 A. That's right.

13 Q. And that range, that date range takes us through 2028,  
14 right?

15 A. Yes. Again, I used those for a royalty rate. I didn't  
16 say what the base should be in the future.

17 Q. Right. And you use a range through 2028 even though  
18 royalties in this case against Cargill's commercial lines  
19 would end in 2025?

20 A. Yes. That's my understanding. Because I'm trying to  
21 arrive at a royalty rate that relies in part on projections  
22 of profitability. That is a profit margin.

23 Q. And you have not -- but you could calculate the rate,  
24 correct, using numbers just through 2025, right?

25 A. You could. But that wouldn't be correct.



~~Jarosz, J. - Cross~~

1 Q. Why wouldn't that be correct?

2 A. Because a company is in the business over an extended  
3 period, or potentially in the business, and we're trying to  
4 figure out what the returns are in that period. You don't  
5 just cut off at some arbitrary point to determine what the  
6 economics of that business is. If you did, then you would  
7 have to restart what Cargill's performance would be, for  
8 instance, or what Nuseed's performance would be in light of  
9 the fact that the new Cargill entry would start brand new in  
10 your hypothetical in 2026. You can't just cut off  
11 consideration.

12 Q. 2025 is not an arbitrary date, is it? That's the date  
13 when royalty payments would end from Cargill and BASF under  
14 the Group A patent?

15 A. Correct. I didn't call it an arbitrary date, I don't  
16 think.

17 Q. I believe you used the word "arbitrary" in responding to  
18 my question.

19 A. Okay.

20 Q. And you did not recalculate this royalty to just show  
21 what these numbers would look like if you just looked through  
22 2025, right?

23 A. No, because that wouldn't be appropriate.

24 Q. And you don't know whether your royalty rate would be the  
25 same if these numbers only included values through 2025,

~~Jarosz, J. - Cross~~

1 right?

2 A. I do know that they would change slightly, but it  
3 wouldn't be the correct way to do it.

4 Q. Okay. And in the purple box you see the \$940 million of  
5 revenues, that's what's in the purple box, right?

6 A. Yes.

7 Q. Okay. And that is revenue projected by Cargill for sales  
8 through 2028, right?

9 A. That's correct.

10 Q. And that's based on a 2018 projection by Cargill,  
11 correct?

12 A. Yes.

13 Q. Okay. And in the blue box, this is the value of  
14 commodity canola, right?

15 A. Yes.

16 Q. And commodity canola is different than omega-3 canola,  
17 right?

18 A. Yes.

19 Q. It does not have omega-3 in it?

20 A. Yes.

21 Q. Okay. And so this is -- this value is how much it can be  
22 sold for; is that right?

23 A. Yes, I think that's right.

24 Q. Okay. And in the orange box, that's the incremental cost  
25 to grow omega-3 canola over commodity canola; is that right?

—Jarosz, J. - Cross—

1 A. I don't think that's right. It's a term that I use that  
2 covers three particular cost components that are in the  
3 contract. I shorthanded it to be incremental costs.

4 Q. Okay. It includes the incremental costs which are the  
5 costs of growing omega-3 canola over commodity canola, right?

6 A. I don't think so. There are three precise components  
7 that are laid out in the contract. If that's one of them, I  
8 agree with you, but I don't remember that to be the case.

9 Q. Okay. What are the three components?

10 A. They're in the contract. I have not memorized them.

11 Q. If you could take a look at CX-181. Can you point us to  
12 what those three components are?

13 A. Sure. You'll have to give me a few moments. I'm not  
14 seeing them right this moment, but they may be in the license  
15 summary that I did in my report.

16 Q. Could you take a look at CX-1148 in your  
17 cross-examination binder.

18 THE COURT: Has this been admitted?

19 MS. SHAW: These are the schedules, Your Honor, from  
20 his expert report. I didn't plan on admitting them. I was  
21 just going to ask him some questions about it.

22 THE COURT: All right.

23 BY MS. SHAW:

24 Q. If you could turn to Page 19. I believe we've tried to  
25 number these pages so it's a little easier to manage in the

~~Jarosz, J. - Cross~~

1 left-hand corner.

2 A. I don't see any page numbers on this. I'm sorry.

3 Q. If we could pull up Page 19 of CX- --

4 THE COURT: Where are the page numbers?

5 MS. SHAW: CX-1140. Unfortunately, it appears that  
6 the paginated page did not make it to your exhibit binder,  
7 but it is tab 5 of your report.

8 BY MS. SHAW:

9 Q. And this tab 5, this is the back-up document for your  
10 calculations on the Cargill royalty, right?

11 A. Yes, it is.

12 Q. Okay. And if you look at line 4, that says "incremental  
13 costs," right?

14 A. Yes. That's the footnote for incremental costs. We use  
15 that terminology, but I think there are three specific  
16 components that are in the contract.

17 Q. Okay. And you also see line 5, it says, "Post-Launch  
18 costs"?

19 A. Yes, I see that.

20 Q. And if you add those lines 4 and 5 together, the 83,596  
21 and the 12,735, you arrive at the number in the orange box in  
22 your slide 14, right?

23 A. If you could put 14 back on the screen, I would confirm  
24 that. And you said 83 ,000. I think that's 83 million.

25 Q. I'm sorry. 83 million.

~~Jarosz, J. - Cross~~

1 A. Yes. The sum of those two is what I've called  
2 incremental costs.

3 Q. And if we go back to your tab 5.

4 A. I'm looking at that.

5 Q. If you look at footnote 4, it describes the incremental  
6 cost number as the incremental cost of producing omega-3  
7 canola over commodity canola, right?

8 A. Yes, that's the terminology I have used.

9 Q. So you would agree that the 83 million number there is  
10 the incremental cost of growing omega-3 commodity canola --  
11 omega-3 canola over commodity canola?

12 A. That's the terminology that I use, but I believe it  
13 covers three specific components in the contract.

14 Q. And you're not able to identify what those are?

15 A. Not right now. If you want me to spend ten minutes  
16 looking through the contract, I'm happy to.

17 Q. Okay. And in arriving at the information in the dark  
18 green box, you're basically -- of Jarosz slide 14, you're  
19 basically taking the total revenue, right?

20 A. Well, the dark green is the value added times 25 percent.

21 Q. Right. I just want to go through this process to make  
22 sure I'm understanding this. So you're taking that total  
23 revenue through 2028?

24 A. Yes.

25 Q. You're taking what the sales price for commodity canola,

—Jarosz, J. - Cross—

1 the value would be through 2028?

2 A. Yes.

3 Q. You're taking what the incremental costs of growing  
4 omega-3 canola would be through 2028, plus the post-launch  
5 costs? That's what we see in the orange box, right?

6 A. It's the sum of the three components in the contract,  
7 which I've called incremental costs, yes.

8 Q. And then you have this -- the green box, the dark and  
9 light green box together, that's how you calculate the value  
10 added by the omega-3 technology, correct, the traits?

11 A. Yes. The sum of the light green and the dark green is  
12 about \$470 million.

13 Q. And then 25 percent of that is what you calculate as the  
14 royalty rate, right?

15 A. Under that contract, yes.

16 Q. And then you divide that 25 percent by the total revenue  
17 through 2028 to arrive at your 12.4 percent; is that correct?

18 A. Yes.

19 Q. Okay. And you would agree that if the commodity canola  
20 value is higher than what is in the blue box, the royalty  
21 amount in the dark green box would decrease, right?

22 A. Yes. Mathematically.

23 Q. And you would agree that if the incremental cost is  
24 higher than what the orange box shows, the royalty amount  
25 would also decrease, right?

~~Jarosz, J. - Cross~~

1 A. Yes. Mathematically, that's how it would work.

2 Q. And then if that 117.4 number decreases, then your  
3 royalty rate would decrease as well, right?

4 A. Mathematically, that's correct.

5 Q. Okay. So I want to talk to you a little bit about your  
6 incremental cost calculation, the number in the orange box.  
7 This is the 96.3 million that we've been talking about. It's  
8 your understanding that this 96.3 million, that is 15 percent  
9 of the total cost of goods plus certain post-launch costs?

10 A. That's right.

11 Q. Right?

12 A. These three components comprise 15 percent of the cost of  
13 goods sold, and then I added on, to be conservative, the  
14 post-launch cost.

15 Q. Okay. And you got this information -- so if you take the  
16 total cost of goods sold, 15 percent of it plus post-launch  
17 costs is -- that's the kind of additional costs associated  
18 with this product, right?

19 A. As specified in the contract, yes.

20 Q. Okay. But you got that 15 percent number that -- that's  
21 the incremental costs for selling omega-3 canola. You got  
22 that 15 percent number from a conversation with Brent  
23 Zacharias and Andy Thomas, right?

24 A. Yes, I did. I talked to them about the three components  
25 and what a percent of cost of goods sold they would

—Jarosz, J. - Cross—

1 represent.

2 Q. Okay. And Mr. Thomas is no longer with the company,  
3 right?

4 A. Correct.

5 Q. And he did not provide any testimony regarding that  
6 incremental cost amount during trial, did he?

7 A. No, not to my knowledge.

8 Q. And Mr. Zacharias has not testified to the incremental  
9 cost number in court, has he?

10 A. No. I don't think he was asked questions at trial about  
11 that.

12 Q. And Ms. Boettner, who testified this morning, she has not  
13 provided any incremental cost testimony; is that right?

14 A. Correct. I did not talk to her about that topic.

15 Q. And you did not review any Cargill documents to determine  
16 what Cargill's incremental costs would be, right?

17 A. I don't think we know what they would be; they haven't  
18 begun selling product.

19 Q. Okay. And you did not review any Nuseed documents to  
20 determine what Nuseed's incremental costs would be, right?

21 A. I think that's right, because, again, they haven't  
22 started selling product, either.

23 Q. Okay. And you did not ask for documents from Nuseed  
24 reflecting their projections about incremental costs, right?

25 A. I think I asked, but I don't think they had documents for



—Jarosz, J. - Cross—

1 those three categories that are laid out in the contract.

2 Q. And you did not review any documents from Cargill  
3 regarding their projections about incremental costs, right?

4 A. Correct. I don't think I saw projections on those three  
5 categories of costs.

6 Q. So if the incremental costs of growing omega-3 canola are  
7 15 percent of the total costs for making this product, would  
8 you agree that the remaining 85 percent of the costs are  
9 costs associated with selling normal commodity canola?

10 A. I think that's right.

11 Q. Okay.

12 A. But I'd have to look at the contract again. I think  
13 that's correct, though.

14 Q. So could you take a look at CX-1148, which is tab 4.  
15 CX-1148, which is your expert report.

16 And my apologies. We tried to get a numbered page  
17 of this in your binders, and it didn't make it in there, but  
18 it is tab 4 of your expert report. It's Page 16 in my  
19 version, if we could put that up.

20 THE COURT: That's not in my book?

21 MS. SHAW: CX-1148, Your Honor.

22 THE COURT: I've got 1148, yeah.

23 MS. SHAW: You don't have tab 4 in there?

24 THE COURT: I don't have any tabs in here.

25 MS. SHAW: It just says "tab 4." There's no actual

~~Jarosz, J. - Cross~~

1 tabs on the top of the page. It will say "tab 4."

2 THE COURT: Well, I don't know. How would I find  
3 tab 4?

4 MS. SHAW: That's why I asked them to put page  
5 numbers on here, to make it a little easier for you, but it  
6 doesn't look like they made it. We're going to try to pull  
7 that up on the screen.

8 THE COURT: All right. I can see it on the screen.

9 MS. SHAW: Could we go to Page 17?

10 BY MS. SHAW:

11 Q. You see the line that says, "Oil revenue estimate,"  
12 Line 3?

13 A. Yes, I do.

14 Q. And do you see underneath that, that says, "Gross  
15 margin," right?

16 A. Yes, it does.

17 Q. And if you subtract the gross margin from the oil revenue  
18 estimate, that's the total cost of goods, right?

19 A. Correct.

20 Q. And if you subtract 382 from 939, you get about 557  
21 million as the total cost of goods, right?

22 A. Yes. You're talking about in the 2019 to 2028 column?

23 Q. Yes, I'm sorry. For the period from 2019 to '28 you get  
24 557 million for the total cost of goods sold, right?

25 A. Yes.

—Jarosz, J. - Cross—

1 Q. And you would agree that 85 percent of that is the cost  
2 associated with growing commodity canola, right?

3 A. I'm not sure, now that you ask that. I don't know.

4 Q. You just testified that 85 percent of this cost was the  
5 cost associated with commodity canola. Are you changing your  
6 testimony?

7 A. I'm saying I'm not sure.

8 Q. Okay. So for the period of time -- so for the period of  
9 time between 2019 and '28, you're not sure whether the cost  
10 of selling commodity canola was \$473 million or not.

11 A. Which number? I'm sorry.

12 Q. The 557 million is the total cost of goods sold, right?

13 A. Correct.

14 Q. 85 percent of that, you thought, was the cost of growing  
15 commodity canola, right?

16 A. That's correct. I think that's right, but I'd want to  
17 look again. I think that's right.

18 Q. Okay. So that number, 557 million, by 85 percent, that  
19 would be \$473 million, right?

20 A. I don't have a calculator here, but that sounds about  
21 right.

22 Q. Okay. Now, we just talked about the value of commodity  
23 canola, right? That's on your Jarosz slide 14.

24 A. Yes.

25 Q. And this is what you testified would be the sales value

—Jarosz, J. - Cross—

1 of commodity canola over that period of time, right?

2 A. I'm sorry. Which number are you focusing my attention  
3 on, again?

4 Q. In the blue box, the 373 million.

5 A. Yes.

6 Q. Okay. So based on your understanding of the cost of  
7 commodity canola, under your calculations, someone selling  
8 commodity canola during this time period, they would be  
9 taking roughly \$100 million loss on sales of commodity  
10 canola; is that right?

11 A. Yes, by that calculation.

12 Q. Isn't it possible that Mr. Zacharias and Mr. Thomas were  
13 wrong about the incremental cost of selling omega-3 canola?

14 A. It's possible, but I asked them about the three  
15 particular categories that are in the contract. They gave me  
16 their best estimate, because we're projecting the future.

17 Q. And isn't it possible they underestimated how much it  
18 will cost?

19 A. Yes, that's possible. It's one of the reasons why I said  
20 projecting the future here is very difficult here and a  
21 permanent injunction might be appropriate.

22 Q. Isn't it possible that it actually costs a lot more to  
23 make omega-3 canola than commodity canola?

24 A. It could be more or less, yes.

25 Q. And if the incremental costs for omega-3 canola in your

~~Jarosz, J. - Cross~~

1 orange box there go up, right, then the royalty number --  
2 that amount would go down.

3 A. Yes. I think you asked me that before. Mathematically,  
4 that's how it would work, yes.

5 Q. And if your royalty amount goes down, then your rate  
6 would go down as well, right?

7 A. Mathematically, yes.

8 Q. Now, you would agree, Mr. Jarosz, that Cargill and Nuseed  
9 have differing views of the value of the potential omega-3  
10 aquaculture market; is that right?

11 A. I'm not exactly sure what you're asking. I think they  
12 both view it as a very attractive business. I think they  
13 have different assessments as to what their success will be  
14 in the business.

15 Q. Okay. If you look at your Jarosz slide 11, in this slide  
16 you note that Cargill's projected revenue from 2019 to 2028  
17 for omega-3 oil is \$940 million; isn't that right?

18 A. Yes, according to this projection.

19 Q. And all these numbers on your slide 11, they slide to  
20 CX-4084-83, right? If you look down there, you can see  
21 that's the document it's citing to.

22 A. I think that's right.

23 Q. Now, I believe Mr. Sung showed you a copy of CX-483 on  
24 your direct examination, but that did not have the metadata  
25 associated with the document; isn't that right?

~~Jarosz, J. - Cross~~

1 A. What do you mean by "metadata"?

2 Q. Are you not familiar --

3 A. I'm not sure how you're using that term.

4 Q. The metadata is kind of hidden information about the  
5 document, about who worked on the document, the date of the  
6 document, those kinds of things.

7 A. Okay. I'm not sure I would have used that definition to  
8 say what "metadata" is, but thank you for that.

9 Q. Okay. I'd like you to take a look at CX-483. And I  
10 believe you had said you thought this document was from late  
11 2018; is that right?

12 A. That's to the best of my memory, yes.

13 Q. So, if you could, take a look at CX-483 in your  
14 cross-examination binder.

15 A. I'm there.

16 Q. If you could, turn to the last page. This is the  
17 metadata. Do you see that?

18 A. I see Mozambique metical, Myanmar, Burma, and NAFTA on  
19 the last page.

20 Q. Are you looking at CX-0483?

21 A. Yes, I believe I am.

22 Q. Okay. It's on the screen, Mr. Jarosz. Do you see that?

23 A. Yes. That doesn't appear to be part of what's in my  
24 binder.

25 MS. SHAW: Your Honor, do you have that page in your

~~Jarosz, J. - Cross~~

1 binder?

2 THE COURT: What?

3 MS. SHAW: The very last page of CX-483.

4 THE COURT: CX -- is that in the cross or direct?

5 MS. SHAW: In the cross binder, Your Honor.

6 THE COURT: CX-483? 0483?

7 MS. SHAW: Yes, Your Honor.

8 THE COURT: No, that's not the last page of mine. I  
9 don't have the metadata, it appears.

10 MS. SHAW: You don't have the metadata. Well, we're  
11 going to have to fix your exhibits. But the last page of the  
12 document does appear on the screen, and this is the metadata  
13 from CX-0483.

14 BY MS. SHAW:

15 Q. Could you take a look at that, Mr. Jarosz.

16 A. Just so that we're clear, it's not the last page of what  
17 I have in my binder.

18 Q. I understand that.

19 A. Yes, I'm looking at it.

20 Q. And that's a metadata page, right?

21 A. I don't know.

22 Q. And do you see the date on which this document was last  
23 modified?

24 A. Yes.

25 Q. And that was in January of 2018, right?

~~Jarosz, J. - Cross~~

1 A. Yes.

2 Q. Okay.

3 A. So it's early 2018.

4 Q. Okay.

5 A. I should correct my testimony to say it was early 2018.

6 Q. So the projections that you relied on are about 21 months  
7 old now; is that right?

8 A. They're about 21 months old now, but they were the last  
9 projections immediately before the hypothetical negotiation  
10 in November of 2018.

11 Q. And it is not unusual for a company approaching the  
12 launch of a new product to be revising projections and  
13 estimates the closer they come to launch; isn't that right?

14 A. I missed one word in what you said. It's not unusual for  
15 what?

16 Q. It's not unusual for companies approaching the launch of  
17 a new product to revise projections and estimates as they  
18 come closer to the launch, right?

19 A. It's quite common. The future is unknown, especially in  
20 a new-to-this-world product.

21 Q. And, in fact, you're aware that Cargill has more updated  
22 financials; isn't that right?

23 A. Yes, I'm aware of that.

24 Q. You're aware that there were more recent 2019 Cargill  
25 projections, right?



~~Jarosz, J. - Cross~~

1 A. Yes. Those were after the hypothetical negotiation, but  
2 I am aware of those.

3 Q. And as late as February 2019 Cargill had updated  
4 projections, right?

5 A. Yes.

6 Q. And you did not consider those when you issued your  
7 report in May of this year, did you?

8 A. I did not quantify them. I was aware of them, but they  
9 did not pre-date the hypothetical negotiation.

10 Q. And you are aware that BASF and Cargill have an expert  
11 named Mr. Napper, right?

12 A. Yes.

13 Q. And you are aware that Mr. Napper calculated some of the  
14 projections based on the 2019 projections; is that --

15 A. Yes -- I'm sorry. I thought you were done.

16 Yes, I'm aware of that.

17 Q. Okay. So if you look at your slide 12, now, Nuseed's  
18 projected revenue is \$8.5 billion, right?

19 A. About 8.6 billion, but, yes, I see that number.

20 Q. Okay. And that number is from CX-964, right?

21 A. Yes, I believe that's correct.

22 Q. And that document is Nuseed's omega-3 budget, right?

23 A. I forget the title of the document.

24 Q. Okay. And you did not talk to anyone at Nuseed about  
25 CX-0964, did you?

~~Jarosz, J. - Cross~~

1 A. I don't recall having done that, no.

2 Q. Okay. And no one from Nuseed has come to testify about  
3 CX-0964; is that right?

4 A. I don't believe so, no.

5 Q. Okay. And if you could -- if we could take a look at  
6 CX-964.

7 A. I'm sorry. Is it in one of the binders?

8 Q. It should be in your cross binder.

9 A. I'm sorry. I don't think it is. I may be missing  
10 something, but it doesn't appear to be.

11 Q. It should be in your direct binder, then.

12 A. Oh, the direct binder. Okay. Yes, I see it there.

13 Q. Okay. Do you see on the first page in column F it says,  
14 "Date last revised"?

15 A. Yes, I do.

16 Q. And the date this was last revised, it says here, is  
17 August 15, 2017?

18 A. Yes, that's what it says.

19 Q. And you were not provided a more recent update, were you?

20 A. I don't recall one way or the other.

21 Q. And, instead, you base the Nuseed projections in your  
22 report on a budget last revised over two years ago; is that  
23 right?

24 A. I'm looking at this document. You've used the term  
25 "budget," and maybe you could remind me why you're using that

—Jarosz, J. - Cross—

1 term.

2 Q. I believe I'm using that term because that's the file  
3 name for the document.

4 A. Okay. I don't see it saying "budget" anywhere, but I did  
5 examine this document.

6 Q. Okay. If you look at the last page of this document, it  
7 has the metadata for the document. I hope it's there.

8 A. No, it's not.

9 Q. Okay. Well, it's on the screen here. Do you see that  
10 there is a file name?

11 A. Yes.

12 Q. And the file name is "Omega-3 Budget, Version 2"?

13 A. Yes.

14 Q. And so this number, the 8.5 billion that covers the  
15 period from 2019 to 2035, that's the -- sorry, it's the  
16 8.6 billion, right? I'm sorry. We should go back to  
17 Jarosz -- that's my fault -- we should go back to Jarosz  
18 slide 12.

19 This 8.6 billion, that covers the period from 2019  
20 to 2035, right?

21 A. Yes, I believe that's correct.

22 Q. So it's not really an apples-to-apples comparison between  
23 the projections you have for Cargill's revenue, which appears  
24 on Jarosz slide 11 and is about \$940 million, right?

25 A. That's correct.

—Jarosz, J. - Cross—

1 Q. Okay.

2 A. But what I used these for was the rate.

3 Q. I understand. But you can actually look at your report  
4 and figure out what Nuseed's projections of revenue are from  
5 2019 to 2028, right?

6 A. Yes, you probably could.

7 Q. Okay. And we can look at your report to figure that out,  
8 right?

9 A. Yes, I would imagine one could.

10 Q. Okay. So if we go to CX-1148, which is your report  
11 again --

12 A. Which binder?

13 Q. The cross binder.

14 A. All right, I'm there.

15 Q. And if we go to -- it's going to be hard for you to find,  
16 so we'll put it up on the screen. It's Page 25 -- actually,  
17 if we can go to Page 26.

18 You can add up the projected revenue to figure out  
19 what that revenue is through 2028, right?

20 A. Yes. You're talking about looking at row 3? Yes, one  
21 could do that.

22 Q. Right. And I'll represent to you I've gone through this  
23 process of adding, and that number is about 2.5 billion. Do  
24 you dispute that number?

25 A. If you give me a minute, I'll eyeball it to make sure.

—Jarosz, J. - Cross—

1 Q. I have a calculator here, if that would be helpful to  
2 you.

3 A. No, I can just eyeball it.

4 What number did you say for revenues?

5 Q. Through 2028, 2.489.

6 A. Yes, that looks about right.

7 Q. Okay. And so -- and if you look at that -- the first  
8 page of tab 7, which is Page 25, for Aquaterra there's  
9 actually revenue that was projected and expected in 2019 of  
10 \$1.484 million, right?

11 A. There was a projection for that year for Aquaterra, yes.

12 Q. Okay. But no such revenue has been realized by Nuseed  
13 for Aquaterra so far this year, right?

14 A. That's correct, yes.

15 Q. Okay. And if you compare the -- just going back, if you  
16 compare the revenue between 2019 and 2028 for both Aquaterra  
17 and for Cargill's Latitude, Cargill estimates about \$940  
18 million, and you would agree that Nuseed estimates \$2.5  
19 billion?

20 A. That sounds right, based on what you said a few moments  
21 ago.

22 Q. So you would agree that Nuseed has a much more optimistic  
23 view of the total revenue from this market than Cargill,  
24 right?

25 A. No, I would agree that it has a more optimistic view as

—Jarosz, J. - Cross—

1 to its performance in the business than Cargill has an  
2 expectation as to its performance in the building.

3 Q. So you would agree that Nuseed thinks it can make a lot  
4 more money in this market than Cargill thinks it can make.

5 A. On a revenue basis, yes. At least as of the point of  
6 these estimates, yes.

7 Q. Okay. You do not have a technical background, do you,  
8 Mr. Jarosz?

9 A. Correct, unless you call economics a technical  
10 discipline, which I don't.

11 Q. I might call it a technical discipline.

12 A. I do not have a background in physical sciences.

13 Q. Okay. So you have to rely on someone else in order to  
14 obtain an understanding of the scope of the patents or the  
15 technology in any license, right?

16 A. I often rely on other technical experts, but I often look  
17 at licenses themselves. You saw that I was author of a  
18 treatise on license for many years, so I've looked at many  
19 licenses over the years.

20 Q. But you would agree that you need to rely on someone else  
21 in order to understand the scope of specific patents or  
22 technology that's referenced in a license, right?

23 A. The precise patented scope, yes. To have an  
24 understanding of the coverage over the inventions, not  
25 necessarily.

Jarosz, J. - Cross

1 Q. Okay. And you would agree that the proponents'  
2 agreement, the agreement between Nuseed and -- CSIRO and GRDC  
3 on the one side and Nuseed on the other, that includes rights  
4 to patents that have not even been asserted in this case; is  
5 that right?

6 A. Yes, that's right.

7 Q. Okay. And you did not attempt to segregate out any value  
8 under that agreement for those unasserted patents, did you?

9 A. I didn't separately value patents other than the ones  
10 that have been asserted here, if that's what you're asking.

11 Q. Right. And you didn't do that because you spoke to a  
12 Mr. de Feyter, from CSIRO, who gave you comfort that it was  
13 not necessary to segregate out the value of unasserted  
14 patents; isn't that right?

15 A. I don't recall our precise conversation, but he told me  
16 generally about the coverage of the 2010 license versus the  
17 asserted patents here.

18 Q. And you relied on that in forming your understanding of  
19 that agreement between CSIRO and GRDC and Nuseed, correct?

20 A. In part, yes.

21 Q. Okay. And Mr. de Feyter is the IP manager for CSIRO;  
22 isn't that right?

23 A. I think he was at one time. I don't know if he currently  
24 is, but at the time that I talked to him I believe he was.

25 Q. And he has not testified at trial here, has he?

—Jarosz, J. - Cross—

1 A. Not to my knowledge, no.

2 Q. So he has not been subject to cross-examination for the  
3 topics you discussed with him; isn't that right?

4 A. Again, I don't believe he's testified here.

5 Q. Okay. And you did not rely on Dr. Kunst for your  
6 understanding of the technology licensed under the  
7 proponents' agreements, right?

8 A. You mean their intra-party agreements or the ones between  
9 CSIRO and GRDC on the one hand and Nuseed on the other? No,  
10 I did not talk to her about that license --

11 Q. So she --

12 A. -- or set of licenses.

13 Q. Okay. So she would not have an opinion on the relative  
14 value of the asserted patents within the license for you to  
15 rely on, correct?

16 A. I don't know. I don't think she generally has an opinion  
17 on economic value. I think she's a technical person.

18 Q. But I'm just asking you if -- she does not have an  
19 opinion on the relative value of technology under the  
20 licenses that you could rely on.

21 A. I don't know, but I don't recall asking her about that  
22 topic.

23 Q. Okay. And you would agree that the proponents' agreement  
24 now includes licenses to a patent that is now co-owned by  
25 BASF, right?



~~Jarosz, J. - Cross~~

1 A. Yes. You mean following the jury verdict on one  
2 particular patent? Yes.

3 Q. Yes. And it also includes licenses to a patent that is  
4 now invalid, right?

5 A. Yes, as I understand it.

6 Q. And you would also agree that at the time the agreement  
7 was entered into by the parties, there are only patent  
8 applications that were identified in the agreement; isn't  
9 that right?

10 A. In 2010? Yes, I believe that's correct.

11 Q. And there are no issued patents identified in either the  
12 license agreement between CSIRO, GRDC, and Nuseed, on the one  
13 hand, or the collaboration agreement between CSIRO, Nuseed,  
14 and GRDC, correct?

15 A. Could you ask that again? I want to make sure that I'm  
16 following it.

17 Q. There are no -- let me break up the question to make it  
18 easier.

19 There are no issued patents identified in the  
20 license agreement between CSIRO, Nuseed, and GRDC, correct?

21 A. That's correct.

22 Q. And there is another agreement between CSIRO, GRDC, and  
23 Nuseed. Isn't that right, Mr. Jarosz?

24 A. There's a collaborative agreement, if that's what you're  
25 referring to, yes.

~~Jarosz, J. - Cross~~

1 Q. Yes. And that collaboration agreement also does not  
2 include any issued patents, right?

3 A. That's right. So even though patents have issued, the  
4 rate hasn't gone up.

5 Q. Okay. And if you -- if you could, take a look at CX-181  
6 in your binder.

7 A. Which binder?

8 Q. The cross binder.

9 A. Okay. I'm there.

10 Q. Could you turn to the page ending in 90893?

11 A. Again, these don't have Bates numbers, besides the first  
12 two pages, at least the version that's in my binder.

13 Q. Do you see a Page 9?

14 A. Yes.

15 Q. Okay. And Page 9, at Section 3.1, this is the grant of  
16 license in the agreement; is that right?

17 A. Yes.

18 Q. Okay. And if you turn the page, this lists all the  
19 things that Nuseed received a license to under this  
20 agreement, correct?

21 A. Yes. Are you referring to A through D?

22 Q. Yes.

23 A. Yes.

24 Q. So it received an exclusive license to core technology,  
25 right?

~~Jarosz, J. - Cross~~

1 A. That's right.

2 Q. And an exclusive license to the project technology,  
3 right?

4 A. Yes.

5 Q. It also received a nonexclusive license to existing  
6 nonexclusive technology, right?

7 A. Yes.

8 Q. And it received a nonexclusive license to additional  
9 patents, right?

10 A. There's more to it in D, but, yes, I agree that D is as  
11 it's stated here.

12 Q. Okay. It's a lot of stuff. I just want to look at one  
13 of these things, and that is the core technology.

14 That is defined, at the page ending 90888, which I  
15 know you don't have in the version in your binder, but that  
16 is Page 4 of the agreement.

17 A. Okay, I'm there.

18 Q. Okay. And there is a definition for "core technology"  
19 towards the bottom of Page 4. Do you see that?

20 A. Yes, I do.

21 Q. Okay. And it defines it as, "Genetic-based technologies  
22 for the production of long-chain omega-3 oils and oilseeds of  
23 transgenic plants comprising inventions, information,  
24 techniques, materials, data, knowledge, know-how, scientific,  
25 technical, and other information developed prior to and

—Jarosz, J. - Cross—

1 independently of the collaborative research agreement, which  
2 is not in the public domain and made available by CSIRO and  
3 GRDC for the project, all of which are described in substance  
4 in parts A and B of Schedule 1 of the collaborative research  
5 agreement." Do you see that?

6 A. There's more to that sentence, but, yes, I see that  
7 provision.

8 Q. "As may be updated by agreement of the parties from time  
9 to time during the term." That's what it says, right?

10 A. Yes.

11 Q. Now, could you take a look at CX-0681 in your binder.

12 A. I'm there.

13 Q. This is the -- and I believe this document has been  
14 admitted. This is the collaboration -- the collaborative  
15 research agreement between CSIRO, Nuseed, and GRDC, right?

16 A. Yes.

17 Q. And this is -- the definition of "core technology" in the  
18 license agreement makes reference to Schedule 1 of this  
19 agreement, correct?

20 A. Yes, I believe so.

21 Q. Okay. And if you turn to Page 27 of the agreement, which  
22 ends in 90957, which is not on your document...

23 Are you there?

24 A. Yes, I am.

25 MS. SHAW: Your Honor, are you there?

~~Jarosz, J. - Cross~~

1 THE COURT: Yes. I'm looking at the screen.

2 MS. SHAW: That's a good choice.

3 BY MS. SHAW:

4 Q. This identifies all of the things that are included in  
5 core technology, right?

6 A. I'm not disputing that, but I don't see that on this  
7 page. Does it say "core technology" somewhere, and I'm just  
8 not seeing it?

9 Q. Do you want to go back and look at CX-0181 that we were  
10 just looking at for the definition of "core technology" on  
11 Page 4?

12 A. Yes. This is the Schedule 1 and part A and B that appear  
13 to be referred to in CX-0181.

14 Q. Okay. And so parts A and B, these were exclusively  
15 licensed to Nuseed under the license agreement, right?

16 A. Yes, I believe so.

17 Q. And so they received exclusive licenses to the three  
18 patent applications you see listed here, right?

19 A. Yes.

20 Q. And they received exclusive licenses to the specific  
21 genes identified in section B, right?

22 A. Yes, that appears to be the case.

23 Q. Okay. And do you see at the top it also -- at the top of  
24 this agreement, it says, "Part C, D, and E of Schedule 1 list  
25 IP that is not exclusively licensed to Nuseed in the field"?

~~Jarosz, J. - Cross~~

1 A. I see that; although, 181 only refers to Parts A and B,  
2 Schedule 1.

3 Q. But you see that this was also -- is not exclusively  
4 licensed to Nuseed, right, parts C, D, and E?

5 A. I assume that's the case. It wasn't a provision we were  
6 just reading, but I believe that's correct.

7 Q. Okay. And if you turn to Page 29 of this agreement,  
8 that's where part C is identified. And part C identifies  
9 various genes and gene sequences from CSIRO, right?

10 A. Yes.

11 Q. Okay. And then part D on Page 30, this was also licensed  
12 to Nuseed, right?

13 A. Nonexclusively, as I understand it, yes.

14 Q. And they got constructs from CSIRO and GRDC, right?

15 A. Yes.

16 Q. Okay. And then in section E there was additional  
17 confidential CSIRO information that Nuseed received, right?

18 A. Yes.

19 Q. And under the license agreement, Nuseed also obtained  
20 ownership of the elite event, right?

21 A. Yes, I believe so.

22 Q. Okay.

23 A. Or co-ownership, but some ownership rights.

24 Q. And they also received ownership rights with respect to  
25 future patents, right?

~~Jarosz, J. - Cross~~

1 A. I think that's right. I don't have a perfect memory on  
2 that.

3 Q. Nuseed, in fact, is the -- one of the owners of some of  
4 the patents that have been asserted in this lawsuit, right?

5 A. That's my understanding, yes.

6 Q. Okay. And you made no attempt to segregate out the value  
7 under the agreement associated with any of these things, did  
8 you?

9 A. That's correct, because, remember, the license provides  
10 the same rate, even if there's only one patent still  
11 remaining at the end of the license.

12 Q. And under the hypothetical negotiation, BASF and Cargill  
13 would not receive any rights to any of these things we've  
14 gone over, have we?

15 A. Correct, it would just receive rights to the patents that  
16 have been found infringed by the jury.

17 Q. And with respect to Cargill's commercial lines, the only  
18 thing that BASF and Cargill need a license for are the Group  
19 A patents, right?

20 A. Certainly, they need the rights under the Group A  
21 patents.

22 Q. And the '541 patent has not been asserted against  
23 Cargill's commercial lines, has it?

24 A. Not against the current commercial line. I don't know  
25 what the future will hold.

—Jarosz, J. - Cross—

1 Q. And you made no effort to apportion any value under this  
2 agreement attributable to just the Group A patents, did you?

3 A. I did in the way that I described on my direct testimony.

4 Q. And that is based on your understanding that all the  
5 patents carry the same value of the whole agreement. Each  
6 patent carries the value of the whole agreement; that's your  
7 understanding?

8 A. That's part of the understanding from the 2010 and 2011  
9 agreements, and it's also based on the testimony of Dr. Kunst  
10 and my conversations with her.

11 Q. And is it your understand that Dr. Kunst reviewed any of  
12 these license agreements?

13 A. I don't think she reviewed these two license agreements,  
14 but she's familiar with the patents.

15 Q. And that's also based on your understanding based on your  
16 discussion with Mr. de Feyter at CSIRO, right?

17 A. That what is based on that?

18 Q. That each patent under the agreement equals the value of  
19 the whole agreement.

20 A. I don't know that he told me that. I don't remember that  
21 we had that conversation.

22 Q. And you made no effort to apportion out the value  
23 associated with the nonpatent rights license under the  
24 agreement, did you?

25 A. I apportioned value associated with these patents in the



—Jarosz, J. - Cross—

1 way that we've talked about. I didn't separately value  
2 things other than the patents-in-suit here.

3 Q. Now, you have based your royalty rate on sales of omega-3  
4 oil by Cargill. That's the royalty base that you think it  
5 should be applied to, right?

6 A. For -- would you mind asking that again? I want to make  
7 sure I'm following it.

8 Q. So the royalty base for future damages is Cargill's  
9 Latitude product, sales from Cargill's Latitude product?

10 A. I don't recall providing an opinion on what the base is,  
11 but that makes sense to me. I did provide an opinion as to  
12 the base for past damages.

13 Q. Okay. And you do not have an opinion on whether the  
14 asserted patents disclosed all the technology necessary to  
15 achieve a viable commercial product, right?

16 A. I would be surprised if that's the case. I think there  
17 are more things that contribute to value. That's why the  
18 licenses that you see don't have 100 percent of the value of  
19 the product payment going to an IP owner.

20 Q. Could you just answer the question I asked, which is:

21 Do you have an opinion on whether the asserted  
22 patents disclose all the technology necessary to achieve a  
23 viable commercial product?

24 A. Not from a technical standpoint, but I'd be surprised if  
25 the patents alone give one everything needed to commercialize

~~Jarosz, J. - Cross~~

1 a product.

2 Q. And you did not have any discussions with Dr. Kunst  
3 regarding whether the asserted patents are essential to the  
4 production of a commercially viable omega-3 canola oil; isn't  
5 that right?

6 A. I recall her saying that these patents are the blueprint.  
7 I don't recall if we used the term "essential" in our  
8 conversation.

9 Q. Could we play Kunst 290, Your Honor, from 20 -- 290-20,  
10 to 291-2?

11 THE COURT: Now, where is his deposition?

12 MR. SUNG: Your Honor, we would object to playing  
13 Dr. Kunst's video deposition to seek to impeach Mr. Jarosz.

14 THE COURT: Who was talking?

15 MR. SUNG: I was, Your Honor. I think what counsel  
16 was referring to is that they would like to play Dr. Kunst's  
17 video deposition as a basis for impeaching Mr. Jarosz.

18 THE COURT: Well, I missed that. I assumed they  
19 were looking for the witness's deposition.

20 MR. SUNG: No, Your Honor.

21 MS. SHAW: Your Honor, I had asked a question as to  
22 whether he had discussions with Dr. Kunst regarding whether  
23 the asserted patents are essential to the production of a  
24 commercially viable omega-3 canola oil, and I believe he said  
25 that he relied on Dr. Kunst's opinion about the value of the

~~Jarosz, J. - Cross~~

1 asserted patents, but he wasn't sure about the essentiality.

2 THE COURT: I think that's a matter for argument,  
3 not a matter for a question.

4 MS. SHAW: Okay. I'll move on, Your Honor.

5 THE COURT: How much longer are you going to be?

6 MS. SHAW: I have a little bit longer, probably  
7 about 20 minutes -- 20, 30 minutes. I'm happy to go through  
8 it now or I can pick it up tomorrow. I'm conscientious of  
9 the Court and Mr. Jarosz.

10 THE COURT: I expect there's going to be some  
11 redirect examination?

12 MR. SUNG: I expect so, Your Honor, but not very  
13 long.

14 THE COURT: Well, let's keep going.

15 BY MS. SHAW:

16 Q. Mr. Jarosz, you're not aware of any sales Nuseed has lost  
17 to Cargill, right?

18 A. That's correct.

19 Q. But it is your opinion that there has been price erosion;  
20 isn't that right?

21 A. There has been some evidence of price erosion so far.  
22 There's likely to be more evidence in the future.

23 Q. And your basis for saying that there is price erosion is  
24 because customers have been hesitant in signing multiyear  
25 agreements; isn't that right?

~~Jarosz, J. - Cross~~

1 A. Yes.

2 Q. And that may impact Nuseed's pricing going forward,  
3 right?

4 A. Yes.

5 Q. But you don't know why customers will not enter into  
6 multiyear contracts with Nuseed, do you?

7 A. Not for sure, I do not, no.

8 Q. And you don't think Nuseed really knows why customers  
9 won't enter into long-term contracts, do you?

10 A. I don't think they know for sure. Ms. Boettner talked  
11 about that topic earlier today.

12 Q. And you did not speak to any potential customers of --  
13 potential customers for Nuseed's omega-3 oil product, did  
14 you?

15 A. No, I did not.

16 Q. You did not speak to anyone in the aquaculture market,  
17 did you?

18 A. I spoke to people at Nuseed.

19 Q. Other than Nuseed?

20 A. I don't recall having a discussion with others in the  
21 business.

22 Q. Okay. And you did not perform any --

23 THE COURT: You don't recall discussions --

24 THE WITNESS: -- with people at Nuseed.

25 THE COURT: -- with people at Nuseed?

~~Jarosz, J. - Cross~~

1 THE WITNESS: Yes.

2 THE COURT: Go ahead.

3 BY MS. SHAW:

4 Q. I think I had a slightly different question. My question  
5 was, you did not have any discussions with anyone in the  
6 aquaculture market other than Nuseed, correct?

7 A. Correct. I agree with that, to the best of my memory.

8 Q. And you did not perform any analysis on the demand in the  
9 aquaculture market for omega-3 canola, did you?

10 A. Not a formal analysis, but I looked at the documents that  
11 had been produced, and they reflect Cargill and Nuseed's  
12 views as to how the marketplace might develop.

13 Q. And you do not have any understanding of what the current  
14 customer acceptance for omega-3 canola oil is, do you?

15 A. I'm sorry. You said "customer expectance"?

16 Q. Acceptance.

17 A. Correct, I do not know, because no one has signed a sales  
18 contract to date.

19 Q. Okay. And you did not talk to any farmers in preparing  
20 your opinion?

21 A. No.

22 Q. You did not talk to any fish feed farmers?

23 A. Correct.

24 Q. You did not talk to any fish feed manufacturers?

25 A. Correct.

Jarosz, J. - Cross

1 Q. And you did not talk to any potential Aquaterra  
2 customers, correct?

3 A. I believe that's correct, yes.

4 Q. Okay. I want to focus a little bit more on the price  
5 erosion issue. You would agree that Nuseed has not finalized  
6 a price for their omega-3 canola products yet, right?

7 A. Correct.

8 Q. And you would agree that both parties here, Cargill and  
9 Nuseed, their pricing strategies will be setting the price of  
10 their omega-3 canola oil relative to the price of fish oil?

11 A. I think both intend to peg the price of their plant-based  
12 omega-3 oil to the fish oil price.

13 Q. And you would agree that both parties here -- their  
14 pricing strategies will be setting that price as a function  
15 of the price of fish oil, right?

16 A. Yes, I think so. In other words, fish oil will be a  
17 consideration in determining what the canola oil price should  
18 be.

19 Q. In fact, both Nuseed and Cargill's products will have to  
20 compete with fish oil in the aquaculture market.

21 A. Yes, I believe that's correct.

22 Q. And you do not have an opinion on what Nuseed's maximum  
23 production capacity would be for the next ten years, do you?

24 A. I don't think I know what it is. I think I -- I know  
25 that it's scaleable, but I don't know precisely what it's

—Jarosz, J. - Cross—

1 scaleable up to.

2 Q. And your understanding that it is scaleable is based  
3 solely on your discussions with Andy Thomas and Brent  
4 Zacharias, right?

5 A. No, I don't think that's right. I think we talked about  
6 this at my deposition. I've seen produced documents that had  
7 stars associated with certain characteristics of Nuseed's  
8 program, and there were four or five stars associated with  
9 scaleability, so I have seen produced documents on that  
10 topic.

11 Q. Okay. But your understanding regarding Nuseed's  
12 capacity, that's based on your discussions with Mr. Zacharias  
13 and Mr. Thomas, right?

14 A. I don't recall if I discussed capacity with them. I  
15 recall discussing scaleability.

16 Q. Okay. So you don't know what Nuseed's capacity is,  
17 right?

18 A. I don't know what its maximum capacity is for this new  
19 product in any particular year. Yes, I agree with that.

20 Q. And you have not spoken to anyone at Nuseed regarding  
21 what their maximum capacity is?

22 A. Not that I recall. I'm not sure if there is someone who  
23 knows the answer to that.

24 Q. And no one from Nuseed has testified at this trial  
25 regarding their capacity for production; is that right?

~~Jarosz, J. - Cross~~

1 A. I don't recall reading or hearing testimony on maximum  
2 capacity. I recall testimony on scaleability.

3 Q. Okay. Could you take a look at PX-55 in your binder?

4 A. Which binder?

5 Q. The cross binder.

6 THE COURT: This is already admitted, isn't it?

7 MS. SHAW: So, Your Honor, the document itself is  
8 admitted, but because it is an Excel file, it's a little  
9 difficult to review, so we've created PX-55, which is a  
10 portion of the document, just so you can see the numbers with  
11 your eyes.

12 BY MS. SHAW:

13 Q. So this is the omega-3 budget document that we looked at,  
14 right? Are you there?

15 A. I'm looking at PX-55. It appears to be a two-page  
16 document.

17 Q. So this is the -- the first page of it, you see that  
18 green chart that we saw in the other document. I'd like to  
19 take you to the second page. Do you see that?

20 A. Yes, I do.

21 Q. Okay. And this is a tab from that CX-964, that larger  
22 document, that's titled "fish oil price and scarcity." Do  
23 you see that? You might not see that here, but that's what  
24 it is, okay?

25 A. Scarcity?



—Jarosz, J. - Cross—

1 Q. "Fish Oil Price and Scarcity." That's the name of this  
2 tab.

3 A. I want to make sure that I'm following.

4 Q. Yes, please orient yourself to the document.

5 A. Where should I find price and scarcity on this? I'm  
6 sorry.

7 Q. Do you see the aqua pricing strategy highlighted in  
8 yellow under "Aqua Pricing Strategy"?

9 A. Yes.

10 Q. So that is the pricing, and then if you go to line 35.

11 A. Yes, I'm there.

12 Q. Do you see that's the "surplus/deficit" line there? Do  
13 you see that?

14 A. Excluding Nuseed, yes, I see that.

15 Q. Okay. So I just want to focus your attention. Let's  
16 first talk about this line 35, the "surplus deficit excluding  
17 Nuseed." This is the kind of deficit of fish oil in the  
18 market as calculated by Nuseed, correct, over time?

19 A. Yes, it's the relationship or difference between demand  
20 and supply, it appears.

21 THE COURT: The deficit between demand and supply of  
22 fish oil?

23 MS. SHAW: Yes. So --

24 THE COURT: This only applies to fish oil? It  
25 doesn't apply to any capacity of either Cargill or Nuseed?

—Jarosz, J. - Cross—

1 MS. SHAW: I'm going to get to that in just a  
2 minute, Your Honor. It's right below here.

3 BY MS. SHAW:

4 Q. And if you look at line 37, that line says, "Nuseed  
5 volume," right?

6 A. Yes, that's right.

7 Q. And that is the -- in this projection, that is the volume  
8 of oils Nuseed would make, right?

9 A. That appears to be the case, yes, or equivalent fish oil.

10 Q. Okay. That's right. And if you see line 39, that's the  
11 percent of total fish oil demand that number could supply.  
12 Do you see that?

13 A. Yes, I do.

14 Q. Okay. And if you look at line 40, that is the percent of  
15 the deficit, the shortage of fish oil that Nuseed could  
16 supply, right?

17 A. Yes. Based on this calculation, yes.

18 Q. Okay. And if you look in column O, that's the  
19 information for 2028, right -- 2025?

20 A. I believe it's 2025, yes.

21 Q. So the percent of the deficit that Nuseed projected that  
22 they could supply in 2025 was 33.7 percent, correct?

23 A. This calculation shows 33.7 percent, and I think they  
24 were figuring the economics of providing that amount.

25 Q. Okay. So, for example, if Cargill was only able to

—Jarosz, J. - Redirect—

1 supply, say, 30 percent of the deficit in 2025, then both  
2 Nuseed and Cargill could both sell to this market without  
3 Cargill taking a single sale from Nuseed; isn't that right?

4 A. I don't know that that's true.

5 Q. If Cargill provided 30 percent of the deficit in 2025 and  
6 Nuseed provided 33.7 percent of the deficit in 2025, you  
7 would agree that Cargill and Nuseed would be providing 63.7  
8 percent of the deficit?

9 A. Using that calculation, that's correct.

10 Q. Okay.

11 A. That doesn't mean Cargill's sales don't come at the  
12 expense of Nuseed.

13 MS. SHAW: I have no further questions. Pass the  
14 witness.

15 THE COURT: All right.

16 REDIRECT EXAMINATION

17 BY MR. SUNG:

18 Q. Mr. Jarosz, opponents' counsel had questioned you about  
19 one of the cases in which you testified previously in which  
20 you had not apportioned with respect to a multicomponent  
21 device or case; is that correct?

22 A. Yes.

23 Q. In your expert opinion, is this a multi-device or  
24 component case?

25 A. No. These patents appear to cover the whole blueprint or

—Jarosz, J. - Redirect—

1 the whole product. This is not an electronics multicomponent  
2 case, for instance.

3 Q. You were also questioned on cross-examination with  
4 respect to CX-0181, the agreement, license agreement, and do  
5 you recall testifying with respect to this?

6 A. Yes.

7 Q. Do you recall how many amendments there are to this  
8 particular contract?

9 A. Sitting here right now, I don't.

10 Q. And if I can refer you to your expert report at tab 3 to  
11 see if that would refresh your recollection.

12 A. I see tab 3, and you'll have to give me a moment, please.  
13 Maybe you have a particular page I should turn to.

14 Q. Line 18 on that document, if you will.

15 A. I'm sorry. This entry is collaborative research  
16 agreement and variations 1 through 5 agreements, so that  
17 suggests that there were at least five.

18 Q. So counsel didn't question you about the patent listing  
19 in any of those other amendments, did she?

20 A. No.

21 Q. If we could pull up Exhibit CX-0483, the last page, the  
22 metadata that counsel referred to.

23 Mr. Jarosz, can you look at the last date modified,  
24 I think, and tell me what date that reflects?

25 A. January 26, 2018.

—Jarosz, J. - Redirect—

1 Q. And can we look at the line right below that, the date  
2 created?

3 A. That's February 28, 2018.

4 Q. Do those two dates suggest to you anything with regard to  
5 this particular metadata?

6 A. I find that very curious that the last modification was  
7 before the date created.

8 Q. You usually don't modify something before you create it;  
9 is that your understanding?

10 A. That's correct. That's why I find this curious.

11 Q. Let's turn to the questioning that opponents' counsel  
12 ended with with respect to the 30 percent of the fish oil  
13 deficit that Nuseed had projected.

14 That was a projection in 2025 based on data back in  
15 2016, 2017; is that your understanding?

16 A. It was a projection for 2025 done in something like 2016  
17 or 2017.

18 Q. And what is your understanding with regard to projections  
19 that are that far in the future?

20 A. It is difficult to estimate the future. It's certainly  
21 difficult to estimate ten years out into the future.

22 Q. And does a projection like that support your discussion  
23 earlier with respect to injunctive relief?

24 A. Yes. The future is unknown. It's unknown as to prices,  
25 it's unknown as to quantities, it's unknown as to revenues

1 and costs, and I've seen a variation in projections in just a  
2 short amount of time because neither party really knows how  
3 this product line will develop.

4 Q. And each of these projections that they're based upon,  
5 they're based on single snapshots in time; would you agree?

6 A. That's correct.

7 MR. SUNG: No further questions, Your Honor. I  
8 think we'd ask that the witness not be excused, however; that  
9 we reserve the ability to recall him, if necessary, for  
10 rebuttal.

11 THE COURT: All right. If you may be recalled as a  
12 witness, you shouldn't discuss your testimony with anyone or  
13 consult any other documents without the prior authorization  
14 of the Court.

15 THE WITNESS: Yes, Your Honor.

16 THE COURT: You can step down at this time.

17 (The witness stepped down.)

18 THE COURT: Does that complete the case in chief for  
19 the proponents?

20 MR. SUNG: Yes, Your Honor. Subject to any  
21 rebuttal, we would close now.

22 THE COURT: All right. Well, I think we'll resume  
23 again at 10:00 tomorrow morning with the opponents' evidence  
24 on damages.

25 MS. SHAW: Your Honor, I do have one question. Just

1 for clarification, I just wanted to understand if the Court  
2 has any preference on how they want to handle closings and  
3 also proposed findings of fact and conclusions of law.

4 THE COURT: Well, I think your proposed findings of  
5 fact and conclusions of law should be ready tomorrow morning  
6 in the hopes that we'll finish the evidence tomorrow and be  
7 able to hear closing arguments.

8 Obviously, you could amend them based on the  
9 evidence that's actually produced either in your case in  
10 chief or rebuttal evidence, but I think both sides should  
11 have that ready tomorrow morning so that it can expedite the  
12 process tomorrow.

13 MS. SHAW: And did I understand correctly that you  
14 did want to do closings, as well, for this phase of the case?

15 THE COURT: Yes. And I don't know how long you  
16 think you need for closing argument.

17 MS. SHAW: I don't have a good estimate right now.  
18 Maybe 15, 20 minutes.

19 MR. SUNG: That would be acceptable.

20 MS. SHAW: Actually, my counsel is telling me a half  
21 an hour.

22 THE COURT: Well, I think I can live with half an  
23 hour each side, and, of course, the proponents would have the  
24 right to open and close on this issue so they could reserve  
25 time for rebuttal.

1 MS. SHAW: Certainly. And just the last  
2 housekeeping issue:

3 As I mentioned on Friday, Dr. Murphy, his testimony,  
4 he was deposed on Saturday, his testimony will be presented  
5 by deposition, and we just wanted to understand from the  
6 Court if they had a preference as to how they receive and  
7 review that evidence; whether you would like us to play the  
8 testimony in court, if you would like to receive a video  
9 clip, if you would like to review the transcript.

10 THE COURT: You mean you have your expert plus  
11 Dr. Murphy? Who else do you have?

12 MS. SHAW: So tomorrow we plan on putting on Dmitry  
13 Gromov from Cargill, as well as Carl Andre and Brian Napper  
14 live, and then we would also have the deposition testimony of  
15 Dr. Murphy, which I understand is around 40 minutes.

16 THE COURT: I don't think this case is ever going to  
17 end.

18 MS. SHAW: I do think we'll be able to get all the  
19 live witnesses done tomorrow and, hopefully, the deposition  
20 testimony of Dr. Murphy, as well. But, again, we just wanted  
21 to see how you would like to receive that evidence.

22 THE COURT: Well, I think that you should present --  
23 you can present it however you want it, but it seems to me it  
24 should be just like the live witnesses.

25 MS. SHAW: Okay, Your Honor.



1           THE COURT: Play his deposition. I don't like to  
2 hear all the evidence in the case and then go back in  
3 chambers and look at a movie. I like to be prepared to rule  
4 when the evidence is concluded, because I believe that I have  
5 a better grasp of the case then than I will months later or a  
6 month later or a week later, going back and looking at the  
7 record.

8           MS. SHAW: We're happy to do that, Your Honor.

9           THE COURT: You lose so much ability to weigh the  
10 evidence when you go back and look at a cold record, so I  
11 like -- that's why I like to have closing arguments as soon  
12 as possible after the conclusion of the evidence, as well as  
13 proposed findings of fact and conclusions of law.

14          MS. SHAW: We're happy to do that, Your Honor.

15          THE COURT: All right. Any further questions?

16          MR. SUNG: No, Your Honor.

17          MS. SHAW: Nothing from us.

18          THE COURT: If you have a rebuttal witness, who  
19 would your rebuttal witness be?

20          MR. SUNG: I think only to the extent that there is  
21 testimony elicited from Mr. Napper would we recall Mr. Jarosz  
22 for that purpose.

23          THE COURT: Okay. We'll be adjourned until 10:00  
24 tomorrow morning.

25               (Proceedings adjourned at 5:28 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

\_\_\_\_\_/s/\_\_\_\_

Carol L. Naughton

November 4, 2019